

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,845
JOINT APPENDIX

United States Court of Appeals
For the
United States Court of Appeals *District of Columbia Circuit*

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED AUG 14 1953

Joseph W. Stewart
CLERK

RUSSELL REDFIELD KLETZING,

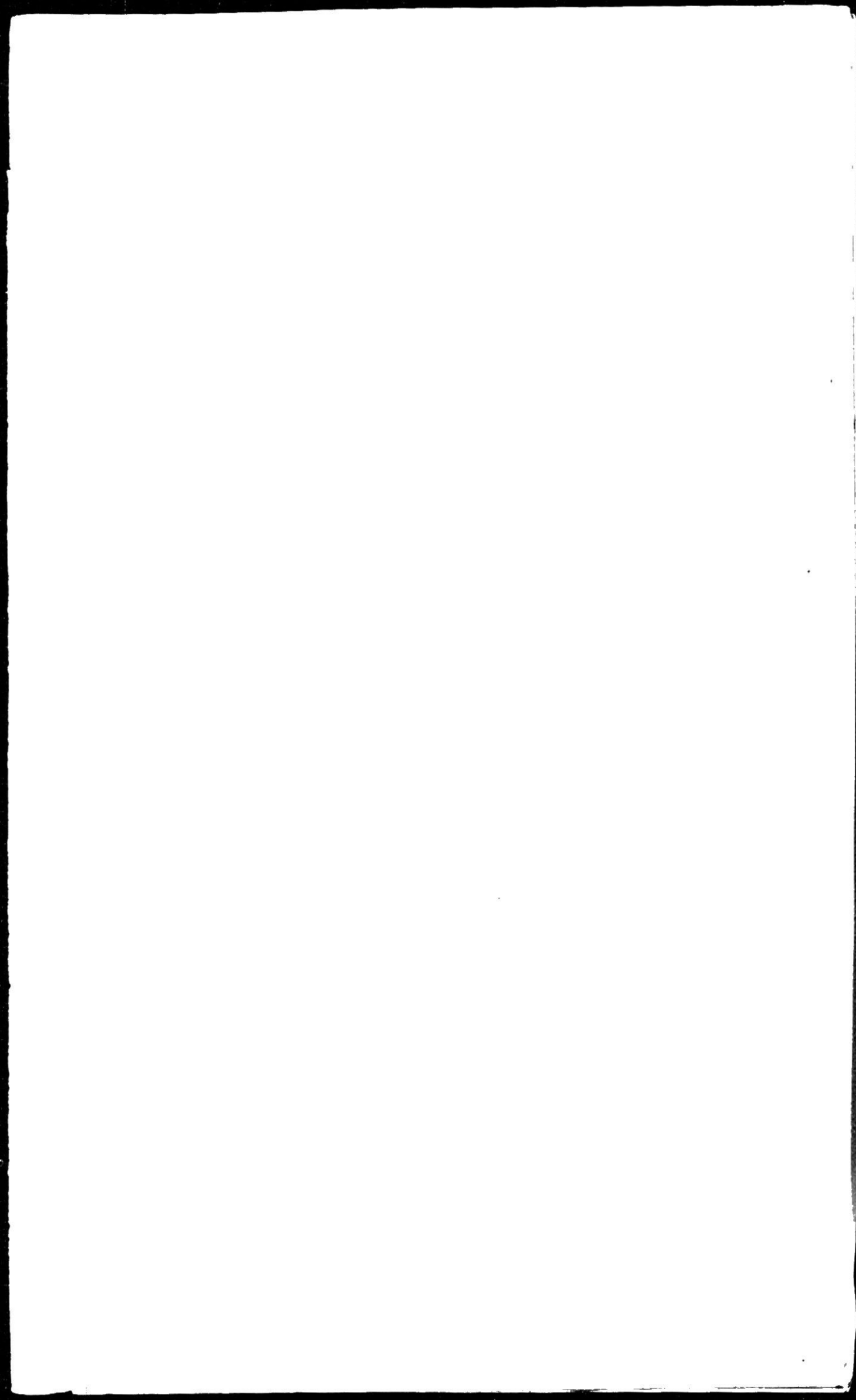
Appellant,

959

ROBERT RAMSPECK, Chairman, FRANCES PERKINS, Commissioner, JAMES M. MITCHELL, Commissioner, United States Civil Service Commission.

Appellees

Appeal from the United States District Court
for the District of Columbia



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,845

RUSSELL REDFIELD KLETZING,
Appellant,

v.

ROBERT RAMSPECK, Chairman, FRANCES PERKINS, Commissioner, JAMES M. MITCHELL, Commissioner, United States Civil Service Commission.
Appellees

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

1 Filed Aug 23 1950 Harry M. Hull, Clerk
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RUSSELL REDFIELD KLETZING

1725-1/2 P Street, Apt. 5

Sacramento, California

Plaintiff

vs.

HARRY B. MITCHELL, Chairman
United States Civil Service Commission
Washington, D. C.

FRANCES PERKINS, Commissioner,
United States Civil Service Commission
Washington, D. C.

JAMES M. MITCHELL, Commissioner,
United States Civil Service Commission
Washington, D. C.

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

Defendants.

CIVIL ACTION NO. 3751-'50

*Complaint for Declaratory Relief and for an Order
Directing Plaintiff's Reinstatement on Civil
Service Registers*

1. The case arises under the Act of January 16, 1883, 22 Stat. 403, U. S. Code, Title 5, Section 633, as amended by the Act of June 10, 1948, 62 Stat. 351, U. S. Code, Title 5, Section 633(2)9; under the Act of June 11, 1946, 60 Stat. 243, U. S. Code, Title 5, Section 1009; and under the Act of June 25, 1948, 62 Stat. 964 amended May 24, 1949; 63 Stat. 105, U. S. Code, Title 28, Sections 2201 and 2202, as hereinafter more fully appears.

2. Harry B. Mitchell is the duly appointed, qualified, and acting Chairman of the United States Civil Service Commission (hereinafter called "the Commission"), and Frances Perkins and James M. Mitchell are duly appointed, qualified, and acting members of the Commission.

3. On November 23, 1948, the Commission issued Announcement No. 137, advertising that the Commission proposed to give competitive examinations designated under the general heading of Junior Professional Assistant. Said Announcement set forth that any person who had certain educational training and/or experience in any one or more of a number of specified fields, and who met certain other requirements, including age, citizenship and physical requirements, could qualify for such examinations. The different fields or kinds of educational training and experience set forth in said Announcement were Astronomer, Bacteriologist, Chemist, Economist, Food and Drug Inspector, Geographer, Legal Assistant, Psychologist, Social Science Analyst, Statistician, Technical Editor (Physical Science), Textile Technologist and Trade-Mark Examiner.

4. Said Announcement set forth that separate registers or lists of eligibles would be established for each of the aforesaid different fields of educational training and experience and that each of the registers would contain the names of all the persons who had passed the examination and met the requirements for that field of educational training and experience. Said Announcement also set forth that separate registers would be established for certain of the different regional areas or offices of the Commission. The persons applying for said examinations were permitted to select the particular areas or offices for which registers they desired to qualify.

5. At the time that said examinations for Junior Professional Assistants were announced, and continuously to the present date, the laws of the United States governing

employment in the classified competitive Civil Service of the United States government, and the regulations of the Commission thereunder, required, and still require, that any person who is to occupy any position of employment in the classified competitive Civil Service calling for the kinds of education and experience of a Junior Professional Assistant referred to in paragraph 3 above, must first, before becoming a competitor for such position, be placed upon a register or list of persons found eligible by the Commission to compete for any of the positions calling for said educational and training experience.

6. At the time that said examinations for Junior Professional Assistant were announced, and continuing to the present date, the laws of the United States governing employment in the classified Civil Service of the United States government and the regulations of the Commission thereunder require, and still require, that the agency of the United States government in which a particular position exists, or is created, is responsible for assigning the duties and responsibilities which make up the position; that the agency may create new positions and change or abolish existing positions; that the Commission has no authority or responsibility to change the duties and responsibilities of a position in another agency; that, however, agencies setting up new positions may, if they so desire, obtain the advice and assistance of the Personnel Classification Division of the Commission.

7. At the time that said examinations for Junior Professional Assistant were announced and continuously to the present date, the rules, regulations and instructions of the Commission governing employment in the classified Civil Service provided, and still provide, that where a vacancy occurs in a particular existing position in the classified service or a new position is created, in any agency of the United States government, the Commission shall certify

5 A

to such agency the names of persons from the appropriate register of eligible competitors in accordance with their relative standing on such register, in order that the agency might consider the qualifications of such eligible competitors for purpose of appointment to such position.

8. Said regulations and instructions of the Commission also permitted, and still permit, the Commission to refuse to certify any eligible competitor, listed on a register, to a particular position in an agency of the federal government on the ground that said eligible
4 competitor is not physically qualified efficiently to perform the duties and responsibilities assigned to that position. Said regulations and instructions of the Commission further provided, and still provide, a procedure whereby the agency, to which eligible competitors have been certified, may object to and reject an eligible on the ground of physical condition, said regulations being in terms and in words as follows (from Federal Personnel Manual, United States Civil Service Commission, Chapter A6, Appointment Requirements and Procedures, at pages A6-7, through A6-11):

"Choosing Among Eligibles

• • • •

"Physical condition.—Appointing officers may not eliminate eligibles from consideration because of physical condition unless formal objection is made as provided on page A6-10 and sustained by the Commission.

• • • •

"Objections to Eligibles

• • • •

"Manner of Submitting Objections

"Form to be used.—Objections should be submitted in writing. There is no standard form for this purpose.

"Amount of detail and evidence to be furnished.—The communication to the Commission should state clearly the reasons why the appointing officer believes that the eligible is not qualified. It must give full information and be supported by adequate evidence.

"If the objection is based on the eligible's physical condition, the appointing officer must give full information regarding this condition and state why he thinks that it will prevent the eligible from performing the duties of the position efficiently. A medical certificate must be furnished if obtained. * * * *

"Commission Action

"After consideration of the information and evidence submitted the Commission will decide whether or not to sustain the objection and notify the appointing officer accordingly. * * * *

"Principles Followed in Passing on Objections

5 "In order to sustain an objection, the Commission must have such evidence that, if it had known the facts and circumstances prior to certification, it would not have certified the eligible for this particular position.

* * * *

"Objection based on Physical Fitness.—The general criterion which the Commission will follow in passing on objections based on physical or mental unfitness will be whether the eligible is able to perform the duties of the position efficiently and without hazard to himself or to others. In making this determination, the Commission considers the duties of the position as it is, and does not require the agency to make a major change in the actual duties of the position or the working conditions, to make it possible for the person to meet the criterion."

* * * *

9. In accordance with its Announcement No. 137, the Commission did hold the examinations described therein and did establish new separate registers or lists of Junior Professional Assistants of the various kinds described therein. Since the establishment of these registers, and continuously until such time as the Commission shall again by examinations set up other new registers, any person not on the registers established as a result of its Announcement No. 137, is not eligible to compete for any position now existing, or hereafter to be created, in the classified competitive Civil Service calling for the education and experience of a Junior Professional Assistant of any of the kinds identified in paragraph 3 hereof.

* * * *

11 29. The action of the defendants in refusing plaintiff a place on the aforesaid Civil Service registers and in voiding and cancelling plaintiff's place on said registers and in causing their agents to cancel and void plaintiff's place on said registers was arbitrary, discriminatory, and in violation of law in that:

(a) It denied plaintiff's right guaranteed to him by the Act of June 10, 1948, 62 Stat. 351, U. S. Code, Title 5, Section 633(2)9, namely, the right of examination and appointment with respect to Civil Service positions without arbitrary discrimination because of plaintiff's blindness.

(b) It arbitrarily denied plaintiff an opportunity for consideration for appointment to Civil Service positions for which he had qualified, in full, in accordance with law and in accordance with the rules and regulations of the Commission.

12 (c) It was taken by the defendants without any finding as required by law, that there were no positions—either existing or which might be created—in any agency of the federal government which

could be filled from any of the aforesaid registers for which plaintiff had qualified, the duties of which positions may be efficiently performed by a blind person.

(d) If the aforesaid letter of the Commission dated March 31, 1950, be deemed to constitute such a finding, then such finding is arbitrary, baseless and in direct contravention to the Commission's own experience and practice, and facts of common knowledge.

30. The action of defendants in denying plaintiff rights guaranteed to him by law is of a character which is reviewable under the Act of June 11, 1946, 60 Stat. 243, U. S. Code, Title 5, Section 1009, and plaintiff seeks judicial review of the action of defendants under this law.

WHEREFORE, plaintiff prays judgment as follows:

(1) That the defendants Harry B. Mitchell, Frances Perkins, James M. Mitchell, and the Commission be enjoined to restore plaintiff's name to the Civil Service registers for the Central Office for Junior Professional Assistant—Technical Editor (Physical Science), and Junior Professional Assistant—Trade-Mark Examiner, and that the defendants be further enjoined to order their agents to restore plaintiff's name to the registers of the Twelfth Region for the positions of Junior Professional Assistant—Technical Editor (Physical Science), and Junior Professional Assistant—Economist, and to the register of the Fourth Region for the position of Junior Professional Assistant—Legal Assistant.

(2) That the court declare and adjudge plaintiff's right to a place on the Civil Service registers as
13 enumerated above, and that the court further adjudge and declare plaintiff's right to be considered on the basis of his ability efficiently to perform the duties of the position, in like manner as other eligible competitors on the register, for every individual vacancy

for which his rank on the registers shall make him eligible of consideration.

(3) For such other relief as the court may deem proper in the circumstances.

COBB AND WEISSBRODT
1822 Jefferson Place, N. W.
Washington 6, D. C.

By: /s/ David Cobb
DAVID COBB

/s/ I. S. Weissbrodt
I. S. WEISSBRODT
Attorneys for Plaintiff

• • • •

105 Filed Dec 21 1951 Harry M. Hull, Clerk

*Answers to Interrogatories Received in The United
States Civil Service Commission
November 30, 1950*

I, William C. Hull, am the Executive Assistant to the United States Civil Service Commissioners. I have received the interrogatories and have caused a search to be made of the official files and records of the United States Civil Service Commission and its regional offices to gather as much information as possible to answer such interrogatories.

1. Miss Ellen Wilson, Assistant Chief, Placement Services Section, Twelfth United States Civil Service Region, 128 Appraisers Building, 630 Sansome Street, San Francisco 11, California, is an employee of the United States Civil Service Commission who is able to testify to the identity of each position in the classified Civil Service filled since September 1, 1949, by persons from the Twelfth United States Civil Service Region register of

Junior Professional Assistant, Economist, and testify with respect to the duties required of the person that filled each of said positions.

The Twelfth United States Civil Service Region reports that a review of their files establishes that only one position of Economist was filled from this register which expired March 10, 1950. The appointee in this instance had a rating of 77. The rating of 72.5 was not reached for certification during the life of the register.

106 2. Miss Ellen Wilson, referred to in answer to interrogatory (1) is an employee of the United States Civil Service Commission who is able to testify to the identity of each position in the classified Civil Service filled since September 1, 1949, by persons from the Twelfth United States Civil Service Region register of Junior Professional Assistant, Technical Editor (Physical Science), and testify with respect to the duties required of the person that filled each of said positions.

The Twelfth United States Civil Service Region reports that a review of their files establishes that no certification of eligibles for filling positions of Technical Editor (Physical Science) was issued from the region's register between April 20, 1949, the date on which the register was established, and March 10, 1950, the date on which the register expired.

3. Mrs. Hallie M. Fulmer, Chief, Placement Services and Information Section, Fourth United States Civil Service Region, Tempo R. Building, 4th and Jefferson Drive, S. W., Washington 25, D. C., is an employee of the United States Civil Service Commission able to testify to the identity of each position in the classified Civil Service filled since September 1, 1949, by persons from the Fourth United States Civil Service Region register of Junior Professional Assistant, Legal Assistant, and testify with

respect to the duties required of the person that filled each of said positions.

The Fourth United States Civil Service Region reports that a review of their files establishes that the register of Junior Professional Assistant, Legal Assistant, is still in existence; that three (3) appointments to the position of Legal Examiner, GS-6, Fort George G. Meade, Maryland, and one (1) appointment as Legal Examiner, GS-5, Veterans Administration Regional Office, Baltimore, Maryland, have been made from this register up to the date of the report (December 8, 1950).

The Region reports further that Mr. Kletzing would have had eligibility for appointment only at GS-5 and if his name had been allowed to remain on the register his rating would not have been reached for certification up to the time of the report (December 8, 1950). A copy of the official statement of duties of the Legal Examiner,

GS-6 positions, Fort George G. Meade is attached
107 hereto as Attachment No. 1 and a copy of the
official statement of duties of the Legal Examiner,
GS-5, positions, Veterans Administration Regional Office,
Baltimore, Maryland, is attached hereto as Attachment
No. 2.

4. Mr. Clayton V. Taylor, Rating Examiner, Examining and Placement Division, Room 245, United States Civil Service Commission, Main Building, Washington 25, D. C., is an employee of the United States Civil Service Commission able to testify to the identity of each position in the classified Civil Service filled since September 1, 1949, by persons from the Central United States Civil Service register of Junior Professional Assistant, Technical Editor (Physical Science), and testify with respect to the duties required of the person that filled each of said positions.

A search of the official files and records of the United States Civil Service Commission's central office reveals that the Junior Professional Assistant, Technical Editor (Physical Science) register was expired March 5, 1950, and that no certificates of appointment from this register were issued during the time the register was in existence.

5. Mr. Clayton V. Taylor, referred to in interrogatory (4) is an employee of the United States Civil Service Commission able to testify to the identity of each position in the classified Civil Service filled since September 1, 1949, by persons from the Central United States Civil Service Office register of Junior Professional Assistant, Trade Mark Examiner, and testify with respect to the duties required of the person that filled each of said positions.

A review of the official files and records of the United States Civil Service Commission reveals that the Junior Professional Assistant, Trade Mark Examiner, examination was announced for the United States Patent Office and that the resulting register is maintained by that office. A contact with the United States Patent Office on January 3, 1951, reveals that the register is still in existence, that to date no eligible has been certified with an examination rating of less than 90 per cent, that there is very little call for use of this register, and that there are no prospects of reaching the 70-79 per cent eligible on the register. If Mr. Kletzing were to be placed on this
108 register he would have a rating of 75.5. A copy of the official statement of duties of Trade Mark Examiner is attached hereto as Attachment No. 3.

6. After consultation with appropriate officials of the Examining and Placement Division and the Medical Division of the United States Civil Service Commission, it has been found that there has been no examination announced by the central office or the regional offices at any

time since June 10, 1948, with respect to persons eligible for appointment to positions requiring legal training which examination or register has been open to totally blind persons.

In this connection it should be stated that the United States Civil Service Commission and its regional offices are precluded from examining applicants for attorney (requiring bar admission) positions in the Federal service by reason of a proviso which has been included in the Commission's item of the Independent Offices Appropriation Act for the current fiscal year, as well as for several previous fiscal years. Because of this, attorney positions in the Federal service are excepted from the competitive civil service and are not filled through open competitive examinations announced by the United States Civil Service Commission or its regional offices.

7. The answer to interrogatory 6 is in the negative.

8. The United States Civil Service Commission has been in existence since 1883 and has been announcing competitive examinations and establishing registers since that date. Many of the older files are incomplete; however, a review of available files fails to disclose that the United States Civil Service Commission at any time prior to June 10, 1948, announced any competitive examinations open to the totally blind in which legal training was a pre-requisite to admission to the examination.

9. The answer to interrogatory 8 is in the negative.

10. No record has been located that would indicate that the United States Civil Service Commission or its regional offices have announced any examinations since June 10, 1948, requiring training in economics for admission to such examinations which were open to the totally blind.

11. The answer to interrogatory 10 is in the negative.

109 12. No record has been located that would indicate that the United States Civil Service Commission at any time prior to June 10, 1948, announced any open competitive examinations requiring training in economics for admission to such examinations which were open to the totally blind.

13. The answer to interrogatory 12 is in the negative.

14-15. By Departmental Circular No. 613 of May 9, 1949, the United States Civil Service Commission made a survey of the Federal service to obtain information concerning the employment of the blind in such service. A copy of Departmental Circular No. 613 is attached hereto as Attachment No. 4.

A total of fifty-two (52) Departments and Agencies responded to Departmental Circular No. 613 reporting the positions which could be filled by the blind. Two agencies (Federal Security Agency, Office of the Administrator, and the Federal Communications Commission) reported a position each which would require legal training and which could be filled by a blind person. These were an Attorney, P-2, position and an Attorney, P-1, position which had formerly been filled by a blind person. These attorney positions would be excepted from the competitive service and would not be filled in an open competitive civil service examination. None of the Department and Agencies responding to Departmental Circular No. 613 reported any positions requiring a training in economics which could be filled by a blind person.

A survey of all competitive examinations announced by the United States Civil Service Commission and its regional offices since 1946 has been made. This survey revealed forty-three (43) types of positions which were suitable for the blind. However, none of these positions required legal training or economics training as a prerequisite for admission to the competitive examination.

16. The statistics sought by the United States Civil Service Commission through Departmental Circular No. 613 did not include the names or addresses of the totally blind persons holding Federal positions.

The applications, medical certificates and other data concerning individuals employed in the Federal service, either in excepted positions or in positions in the competitive service, are maintained by the employing
110 Departments and Agencies. The service record statistics maintained by the United States Civil Service Commission on these individual employees does not include data concerning possible physical disabilities.

/s/ William C. Hull
William C. Hull
Executive Assistant

Subscribed and sworn to before me, a notary public, in and for the District of Columbia, this 4th day of January, 1951.

/s/ Illegible
Notary Public

(SEAL)

My Commission expires Jan. 1, 1956

111 Filed Dec 21 1951 Harry M. Hull, Clerk
Legal Examiner

Major Duties

1. Processes non-support inquiries and court actions concerning military personnel in which the Army JAG Office serves as intermediary to protect military personnel and/or effect satisfactory settlement. Studies court orders, judgments, case histories, individual statements and other legal documents in connection with separations, divorce, children custody, support payments, to

assure military personnel is complying with the law has sufficient legal grounds for non-compliance, is properly informed of his legal and military rights. Prepares correspondence in connection with cases covering opinions, recommendations requiring the application, and interpretation of state laws, federal laws, legal documents, etc.

2. Prepares opinions on the applicability of sales tax, property tax, gasoline tax and various other state taxes to military personnel, private establishments operating within the confines of a military reservation, civilians, residing on military reservations, reserve and national guard personnel utilizing state or commercially owned property and facilities.

3. Reviews the legal sufficiency of investigations, findings and recommendations regarding individual or group responsibilities, negligence, or accountability in such matters as burglary, fire, theft. Studies and checks statements, circumstances and evidence for soundness of findings, evidence substantiate findings, procedures were properly followed. Recommends approval or reestablishment of boards for complete new investigation, additional evidence reconsideration. In cases of rejection prepares analysis of reason therefor.

4. Prepares authoritative opinions and decisions with respect to legal questions arising in or applicable to the functions of the military affairs division entailing the furnishing of legal interpretations and advise with reference to application to facts of statute law, administrative procedures, regulations, orders, judicial and quasi-judicial orders covering such matters as administration, enlistment pay and allowances, promotion, retirement, line of duty, discharge, contracts. Draws up bonds and contracts.

5. Reviews applications for transfer of personnel from other arms of service into JAG Corps. Checks experi-

ence and training, age, rank, status, T/O's etc. to determine if transfer would be beneficial to JAG Corps. Recommends approval or disapproval of application.

Performs other incidental duties as assigned.

Attachment #1

112 Filed Dec 21 1951 Harry M. Hull, Clerk

Fourth Region—Cert. 18382
V.A. Regional Office
Baltimore, Md.

LEGAL EXAMINER, CAF-650-5

DUTIES AND RESPONSIBILITIES:

1. Responsible for requesting and analyzing accountings of guardians and other fiduciaries appointed by state courts, legal custodians recognized by the VA, and Chief officers of hospitals to insure compliance with the provisions of Federal and State laws and regulations of the VA under supervision of a legal and guardianship attorney or a higher grade fiduciary accounts analyst.

2. Conducts correspondence regarding accounting matters, such as proper investment of surplus funds, allowances for wards and upon own initiative effects adjustments of irregularities.

3. Prepares memoranda to Legal and Guardianship Attorney showing irregularities discovered in analysis of accounts necessitating legal action.

4. Maintains daily records for inclusion in monthly and semi-annual reports.

5. Requests initial and intermediate social surveys. Reviews such reports and endeavors to adjust unsatisfactory conditions.

6. Maintains account due cards as a diary action on accounts.

18 A

7. Interviews fiduciaries, personally and by telephone, and answers inquiries on accounting and other matters.

8. Obtains information as to payments to fiduciaries in verification of accounts.

9. Prepares follow-up letters on delinquent accounts.

10. Instructs fiduciaries as to their duties under the Federal and State laws and VA regulations and as to preparation of accounts.

11. Prepares accounts for court fiduciaries, legal custodians and managers of hospitals.

12. Withdraws card records from Locator Index files at termination of guardianship and makes appropriate disposition of same.

13. Checks surety bonds of fiduciaries as to sufficiency and arranges for increase or reduction in amount thereof when appropriate.

14. Requests suspension of payments in appropriate cases and notifies the adjudication agency when provision of Section 1, Paragraph (B) of Public Law 662, 79th Congress, are applicable.

15. Prepares Summary of Account.

16. Determines that appropriate claims are filed in behalf of minor or mentally incompetent beneficiaries under laws administered by the VA.

Attachment #2

113 17. Determines upon analysis of final accounts of fiduciaries upon death of wards, whether there are surviving relatives capable of inheriting or whether the estate should escheat to the United States pursuant to Section 21 (3) of the World War Veterans Act, as

amended (38 U.S.C. 450), or whether the personal property should vest in the Post Fund pursuant to Public Law 382, 77th Congress (38 U.S.C. 17). Refers such cases to Legal and Guardianship Attorney for attention when legal action becomes necessary.

18. Duties require thorough knowledge of Federal and State laws, local practice and procedure, regulations of the VA, instructions issued pursuant to laws administered by the VA, Solicitor's precedents and court decisions.

19. Performs other duties as may be assigned by Regional Chief Attorney.

114 Filed Dec 21 1951 Harry M. Hull, Clerk

TRADE MARK EXAMINER

Basic work of examiners in this series is

1. Examine applications for registration of trade marks for adherence to numerous matters of form specified or implied in the statutes, rules, orders and court and Commissioner's decisions;

2. Ascertain what is disclosed in statements, drawings, etc.

3. Determine registrable qualifications of trade marks;

4. Determine related and remote classes which should be searched to determine whether marks for which registration is sought have been anticipated by prior references and perform such searching in Patent Office files;

5. Determine need for requiring divisions between diverse arts covered by marks in single applications by determining whether such applications cover two or more nonrelated arts;

6. Writing decisions involving technical and legal matters; and other related tasks.

(See Trade-Mark Registration Examining duties in explanatory statement of specifications for Trade-Mark Examining Series, GS-1280-C).

At the GS-5 (P-1 in printed standards) level the work consists primarily of orientation. The standards for this level state that this orientation consists of four phases—

1. Examiner's study of the more frequently used guide lines (listed in general statement as trade-mark statutes, rules relating to registration of trade marks, previous division actions, court decisions, anticipatory matter in assigned arts, periodicals and other reference material);

- 2 and 3. Instruction by supervisors and in class-room;

4. Testing examiner's comprehension of basic procedures through his performance of simpler phases of examining work such as checking applications for clearly specified matters of form, making initial studies of applications, making searches in pertinent phases of arts, etc.

Note: In the Encyclopedia Americana a trade mark is defined as a mark or sign indicating the source or origin of the articles to which it is affixed. A trade mark may consist of a word or words or of a symbol, design, device or picture; or it may be constituted by an original and distinctive shape or form of package in which the goods are packed or contained; or it may consist of a combination of some or all of these elements.

Attachment No. 3

21 A

115 Filed Dec 21 1951 Harry M. Hull, Clerk

DC 613(1)

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

May 9, 1949

M:WCS:mm

DEPARTMENTAL CIRCULAR NO. 613

To Heads of Departments and Independent
Establishments

(For distribution only to headquarters office of Federal
agencies in the metropolitan area of Washington, D. C.)

SUBJECT: Request for information concerning the em-
ployment of blind and deaf persons in the depart-
mental service.

An essential part of the Commission's program for the placement of physically impaired persons relates to counseling and advice given to veterans and non-veterans with reference to their particular physical handicaps, to answering inquiries, and to making reports concerning the extent to which persons with specific physical handicaps are utilized in the Federal service.

In this connection, two of the most difficult groups to advise have been those who are totally blind or fall within the classification of legal blindness, and those who are deaf. "Legal blindness" covers those persons whose vision in the better eye cannot be corrected beyond 20/200 (Snellen). "Deaf" covers those persons whose hearing cannot be corrected by a hearing aid. This difficulty can be readily understood since any consideration relating to the employment of persons with either of these handicaps involves not only the abilities of the particular individual,

but also the work situation in which he must carry out his duties.

Since the end of the war, and more recently with the passage of Public Law 617, 80th Congress, amending the Civil Service Act to prohibit discrimination in Federal employment toward physically impaired individuals, it has become increasingly evident that the Commission cannot carry on its responsibilities toward individuals with these handicaps, intelligently, without more specific knowledge covering the employment of the blind and the deaf, which can only be secured from appointing officers in the Federal service.

For this reason, your cooperation is requested in furnishing answers to the following questions, based on sources of information readily available, and covering departmental service only. Your answers should, of course, be given separately for each category, blind or deaf:

1.

(a) At the present time how many positions are occupied by blind or deaf persons (see definitions above)?

Attachment No. 4

116 (b) Please list each such position, showing for each the title, type of appointment made, and the grade and salary for each position listed.

2. If you are aware of any other positions in your agency which have been occupied by blind or deaf persons during the past few years, particularly since 1942, please describe the types of such positions.

3. Please describe your experience in the employment of blind or deaf persons:

(a) In general, how successful has your experience been in the employment of blind or deaf persons in the positions listed above?

(b) What special arrangements, if any, did you have to make in order that the blind or deaf persons could fill these positions, such as changing the duties or working conditions?

(c) Are there special working conditions or other unusual circumstances in your agency which would make the employment of blind or deaf persons particularly easy or difficult? If so, please explain.

4. What positions in your agency whether or not listed above do you feel could be filled by blind or deaf applicants? Please furnish information concerning the number and types of positions you believe will be available in your agency to which blind or deaf persons might be appointed within the next twelve months.

Your advice on the points listed above, together with any other comments you may wish to make on the employment of blind or deaf persons is earnestly requested. A reply is requested within sixty days from the date of this letter. Your report should be submitted to the U. S. Civil Service Commission, Attention: Medical Division, Washington 25, D. C.

Reports requested herein have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

Very respectfully,

/s/ L. A. Moyer
L. A. Moyer
Executive Director
and Chief Examiner

• • • •

14 Filed Aug 14 1951 Harry M. Hull, Clerk

Order for Substitution of Party Defendant

Plaintiff, having moved the Court pursuant to Rule 25(d) of the Federal Rules of Civil Procedure for a substitution of Robert Ramspeck, Chairman, United States Civil Service Commission, as successor to defendant Harry B. Mitchell, there being no objection to said motion for substitution, and the Court finding that said motion is timely, and there is a substantial need for continuing and maintaining the action against the successor of the party for whom substitution is sought,

IT IS HEREBY ORDERED that Robert Ramspeck be substituted as party defendant for Harry B. Mitchell.

/s/ Walter M. Bastian
United States District
Judge

Dated August 14, 1951

* * * *

87 Filed Dec 21 1951 Harry M. Hull, Clerk

*Deposition of Louis H. Rives, Jr., on Written
Interrogatories*

DISTRICT OF COLUMBIA: SS

Louis H. Rives, Jr., appearing as a witness for the plaintiff in the above-entitled cause, after being duly sworn according to law, on his oath, answers the following interrogations, as hereinafter shown, viz:

1. Question: Please state your full name and address.

Answer: Louis H. Rives, Jr., 8216 Fifteenth Avenue,
Langley Park, Hyattsville, Maryland

2. Question: Are you totally blind?

Answer: Yes.

3. Question: If your answer to interrogatory number 2 is in the affirmative, for how long have you been totally blind?

Answer: Thirty-one years.

4. Question: Have you ever been employed by the United States Government?

Answer: Yes.

5. Question: If your answer to interrogatory number 4 is in the affirmative, did you take a competitive examination to become eligible to obtain your first position of employment with the United States Government?

88 Answer: Yes.

6. If your answer to interrogatory number 5 is in the affirmative, please identify as fully as you are able the competitive examination that you took.

Answer: Examination for Attorney positions, administered in the spring and early summer of 1943.

7. What office or agency of the United States Government administered the examination that you took?

Answer: The Board of Legal Examiners.

8. When and where did you take the written portions, if any, of the examination?

Answer: In the spring of 1943 in Norfolk, Virginia.

9. When and where did you take the oral portions, if any, of the examination?

Answer: In July 1943 in Roanoke, Virginia.

10. For what kinds and grades of positions in the United States Government employment was the examination given?

Answer: For positions ranging from Law Clerk Trainee, grade CAF-4, through Attorney, grade P.4.

11. Were you a member of any Bar at the time that you took the examination, and if so, of what Bar?

Answer: Yes; of the Virginia State bar.

12. Did the mark that you obtained in the examination make you eligible to compete for positions of employment in the United States Government?

Answer: Yes.

13. If your answer to interrogatory number 13 is in the affirmative, for what grades and kinds of positions did you become eligible to compete as a consequence of your mark obtained in the examination?

89 Answer: Law Clerk Trainee, grade CAF-4, and Jr. Attorney, grade P-1.

14. Were you placed upon a list or register of candidates eligible for such positions?

Answer: Yes.

15. Was any suggestion ever made to you by the office of the Government administering the examination that you were not eligible for a place on the register by reason of your total blindness?

Answer: No.

16. Did you make a full disclosure of your total blindness at the time of taking the examination or prior thereto?

Answer: Yes.

17. Was any provision made in the rules covering the examination to permit, or assist, a totally blind person to take the examination?

Answer: Yes.

18. When you obtained your first position in the United States Government were you made eligible to compete for that position by reason of your place upon the register?

Answer: Yes.

19. How long was your name on the register before you were appointed to this first position?

Answer: I do not know when the register was established, but I took the examination in the spring of 1943 and was appointed on October 26, 1943.

20. During this period while your name was on the register were you offered opportunities to fill any other positions in the United States Government employment for which you were made eligible by reason of your place upon the register?

90 Answer: Yes.

21. If your answer to interrogatory 20 is in the affirmative with respect to each of these other positions, specify the name of the agency of the Government involved and the name and grade of the position and principle duties thereof and indicate whether or not you obtained an offer of employment for said position.

Answer: See supplementary sheet.

22. With respect to the position of employment which you took in the United States Government as a consequence of your eligibility on the register, specify the name of the agency of the Government involved and the name and grade of the position and the date of your appointment.

Answer: Federal Security Agency, Office of the General Counsel, Attorney, P-1. I was appointed on October 26, 1943.

23. What were your duties in the position referred to in interrogatory 22 above?

Answer: See supplementary sheet.

24. Were you able to perform the duties entailed in this position to the satisfaction of your supervisors?

Answer: Yes.

25. What efficiency ratings did you obtain while employed in this position and on what dates did you receive these ratings?

Answer: On April 27, 1944, I received a preliminary trial period rating of Excellent. On October 6, 1944, I received a final trial period rating of Excellent.

91 26. Were you promoted from this position to a higher grade position in the same office?

Answer: Yes.

27. If your answer to interrogatory number 26 is in the affirmative, state the date of your promotion and the name and grade of the position to which you were promoted.

Answer: I was promoted on January 16, 1945, to the position of Attorney, P-2.

28. What were your duties in the position referred to in interrogatory 27 above?

Answer: Same as above in answer 23, but with less supervision and with greater responsibility for independent action.

29. Were you able to perform the duties entailed in this position to the satisfaction of your supervisors?

Answer: Yes.

30. What efficiency ratings did you obtain while employed in this position and on what dates did you receive these ratings?

Answer: While in the P-2 Attorney position I received Very good ratings on April 24, 1945; May 2, 1946; and April 7, 1947.

31. Have you continued your employment in the United States Government to the present date?

Answer: Yes.

32. What is your present grade and position and in what office and agency are you now employed?

Answer: I am now employed in the Federal Security Agency, Office of Vocational Rehabilitation, as Vocational Rehabilitation Adviser-Specialist (Blind Rehabilitation Specialist), GS-11.

92 33. Do you know of any position, or positions, in the employment of the United States Government, the duties of which are able to be performed by a totally blind person, which position, or positions, would be appropriately classified "Junior Professional Assistant, Legal Assistant" with opening grades at P-1 and CAF-5 or the equivalent?

Answer: Yes.

34. If your answer to interrogatory number 33 is in the affirmative specify the position or positions to which you have reference and the agency or agencies in which such positions are found.

Answer: See supplementary sheet.

Attached:

Two supplementary sheets.

/s/ Louis H. Rives
Louis H. Rives, Jr.

Subscribed and sworn to before me this 6th day of
December, 1951.

/s/ Lloyd A. Tyler
Notary Public

My commission expires May 31, 1953.

93 SUPPLEMENTARY SHEET

Deposition of Louis H. Rives, Jr. on
written interrogatories

Civil Action No. 3751-50

21. Answer: To the best of my recollection I received three tentative offers for a position. One was from the Office of Price Administration, grade P-1. In this position I would have been assigned to some field office where my primary function would have been answering questions from the public concerning interpretation of price control regulations. Another tentative offer was from the Department of the Interior for a position of Law Clerk Trainee, grade CAF-4. In this position I would have been assigned to a field office in the Bureau of Reclamation where my primary duties would have been assisting in the preparation of government contracts. A third tentative offer of a position was made by the Department of Agriculture at a grade of Junior Attorney, P-1, for some special project the nature of which I do not recall.

23. Answer: Under the general supervision of the principal attorney, I had responsibility for interpreting all Federal laws affecting vocational rehabilitation; to

conduct legal research and prepare legal opinions on questions arising under the vocational rehabilitation program; to review and analyze all State laws affecting vocational rehabilitation and to determine their conformity with Federal requirements; to review and analyze State plan material to determine its compliance with Federal requirements; to assist in the drafting of Federal and State legislation; to draft regulations for promulgation in the Federal Register; to represent the Office of the General Counsel at conferences with administrative officials and to take final action, for the Office, in all the areas outlined approximately 50 percent of the time.

34. Answer: It is my understanding that there presently exist in the Federal Security Agency two positions, grade GS-5. One of these is called Legal Assistant, the other Junior Attorney. The difference in title is occasioned by the fact that for the Legal Assistant position it is not necessary for the appointee to be a member of a bar while for the Junior Attorney position membership in a bar is required. The functions of these positions are substantially the same and include analysis and digesting of Federal and State laws; the analysis and digesting of court decisions, Attorney General Opinions, Comptroller General Opinions, and precedent opinions of the Office of the General Counsel. All of these functions are performed under the supervision of a higher grade Attorney. In essence, these functions are similar to those performed by me while holding the position of Attorney, P-1 referred to under 22, above.

I think that it is important to emphasize that the job descriptions for government attorney positions are often phrased in general terms covering a wide variety of tasks but that frequently the specific duties to which an individual is assigned may concentrate on a particular phase of the broad description. For example, analysis and

94 comparison of State grant-in-aid statutes could be a full-time assignment. It has been my experience that, while certain duties included in a particular job description may be difficult for blind persons to perform, in fact, the nature of the particular assignment within the job description may be confined to duties which a blind person can perform as well as a sighted person.

I am not familiar with specific job titles in other agencies and departments which would be classified as "Junior Professional Assistant, Legal Assistant," or with the job descriptions for these positions. However, from my experience I do know that such positions exist and include duties such as the analysis of laws, the interpretation of regulations, and the preparation of contracts, which could be performed by blind persons.

L. H. R.

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95 Filed Dec 21 1951 Harry M. Hull, Clerk

*Deposition of Louis H. Rives, Jr. on Cross-Interrogatories
Propounded by Defendants*

DISTRICT OF COLUMBIA: SS

Louis H. Rives, Jr., appearing as a witness for the plaintiff in the above-entitled cause, after being duly sworn according to law, on his oath answers the following cross-interrogatories propounded to him by defendants.

(1) Was your first examination for entry into the Federal service given you by the then Board of Legal Examiners?

Answer: Yes.

(2) Did the then Board of Legal Examiners establish its own standards for examination of applicants for legal positions in the Federal service?

Answer: To the best of my knowledge, "Yes."

(3) In the performance of your duties in legal positions in the Federal service which you have occupied, has it been necessary for someone to serve as a reader to you?

Answer: Yes.

(4) If your answer to the previous cross-interrogatory is in the affirmative, state what types of materials it has been necessary for some other person to read to you in order that you might perform the duties of the legal positions in the Federal service which you have occupied.

Answer: All written or printed materials used in my work had to be initially read to me.

(5) State fully the respects in which you have found it necessary to have the assistance of a reader in the performance of the duties of the legal positions you have occupied in the Federal Service.

Answer: See supplementary sheet.

/s/ Louis H. Rives, Jr.
Louis H. Rives, Jr.

Attached:
Supplementary sheet.

Subscribed and sworn to before me this 6th day of December, 1951.

/s/ Lloyd A. Tyler
Notary Public

My commission expires May 31, 1953.

96 SUPPLEMENTARY SHEET

Deposition of Louis H. Rives, Jr. on
cross-interrogatories propounded
by defendants

Civil Action No. 3751-50

5. Answer: It has been necessary for me to use the services of a reader in the following respects in connection with positions of a legal nature which I have held in

the Federal service: The initial reading of correspondence requiring answers; written requests for opinions; and all source material, e.g., statutes, court decisions, Comptroller General Opinions, etc.

Any materials which would ordinarily require more than one reading were recorded on standard office recording equipment at the first reading so as not to require the use of the reader's time for repeated readings. Materials which I frequently used for reference were transcribed by me into Braille, usually on my own time.

L. H. R.

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97 Filed Dec 21 1951 Harry M. Hull, Clerk

*Deposition of Donald H. Dabelstein, on
Written Interrogatories*

DISTRICT OF COLUMBIA: SS

Donald H. Dabelstein, residing at 709 Chalefonte Drive, Beverly Hills, Alexandria, Virginia, appearing as a witness for the plaintiff in the above-entitled cause, after being duly sworn according to law, on his oath, answers the following interrogations, as hereinafter shown, viz:

1. Question: Please state your name and address.

Answer: Donald H. Dabelstein, 709 Chalefonte Drive, Beverly Hills, Alexandria, Virginia.

2. What is your present position of employment?

Answer: Assistant Director, and Chief, Division of Rehabilitation Standards, Office of Vocational Rehabilitation, Federal Security Agency.

3. How long have you been employed in work relating to vocational rehabilitation?

Answer: I have been working in the field of Vocational Rehabilitation since February 1937.

4. How long have you been employed in the service of the United States Government?

Answer: I entered the Federal service on February 1, 1944, with the Office of Vocational Rehabilitation, Federal Security Agency.

5. What educational or training courses have you taken and what degrees have you received which qualify you for your work in the field of vocational rehabilitation?

98 Answer: I was graduated from the University of Minnesota in 1931 with a BS degree; my major field of concentration was educational psychology.

In 1933 I received the MA degree from the same institution, concentrating in the field of educational psychology.

From 1933 to 1935 I completed all the work leading to the doctor of philosophy degree other than the preparation of the thesis.

6. What has been your employment experience in the work of vocational rehabilitation?

Answer: See supplement.

7. Is it a part of your professional work that you study and investigate kinds and types of positions of employment that totally blind persons are able to fill satisfactorily?

Answer: Yes.

8. Are you familiar with the kinds and types of positions of employment that totally blind persons are able to fill?

Answer: Yes.

9. Are totally blind persons able to be trained through education and experience to be attorneys?

Answer: Yes.

10. Is legal work one of the fields in which totally blind persons are able to achieve a full measure of usefulness despite their physical handicap?

Answer: Yes.

11. If your answer to interrogatory number 10 is in the affirmative, please state your reasons.

Answer: The primary prerequisites for a good lawyer are a clear, logical, discerning and retentive mind and the ability to present arguments effectively. The loss of sight does not in any way impair these faculties in a person. During the last five years more than thirty blind persons have been trained and successfully placed as lawyers through the Federal-State Vocational Rehabilitation Program.

99 12. Are you familiar with the kinds and types of positions that are classified "Junior Professional Assistant, Legal Assistant" in the employment of the United States Government with opening salary grades of P-1 and CAF-5, or the equivalent?

Answer: Somewhat.

13. Are you familiar with the duties required of employees in certain of such positions referred to in interrogatory 12?

Answer: Yes.

14. Is it your opinion that certain positions classified "Junior Professional Assistant, Legal Assistant" with grade P-1 or CAF-5, or the equivalent, can be performed satisfactorily by a totally blind person?

Answer: Yes.

15. If your answer to interrogatory 14 is in the affirmative, please specify the positions to which you have reference.

Answer: See supplement.

16. Is it your opinion that certain positions in the employment of the United States Government like those classified "Junior Professional Assistant, Legal Assistant" with grade P-1 or CAF-5, or the equivalent, can be performed satisfactorily by a totally blind person?

Answer: Yes.

17. If your answer to interrogatory 16 is in the affirmative please specify the positions to which you have reference.

Answer: I do not know the specific titles of positions classified as "Junior Professional Assistant, Legal Assistant." However, I do know that "Legal Assistant" positions similar to those discussed in the answer to Question 15 exist in most government agencies and it is my belief that many of these positions can be filled by qualified blind attorneys.

18. Will you please assume the following set of facts? The Civil Service Commission has announced an examination for the position of Junior Professional Assistant, Legal Assistant, with an entrance grade of P-1 or CAF-5, or the equivalent thereof. The physical requirements specified for applicants are as follows:

100 "Applicants must be physically capable of performing the duties of the position and be free of such defects or diseases as may constitute employment hazards to themselves or fellow employees. Persons with physical handicaps which they believe will not prevent their satisfactory performance of the duties of the position are invited to apply. *Some positions require higher physical ability than others. Applicants who fail to meet the higher requirements may be disqualified for such posi-*

tions, but their standing on the register and their eligibility for other positions will not be affected thereby."
(Part underlined is printed in italics.)

An applicant for this examination is totally blind. He takes the examination and obtains a mark that gives him a place upon a register of competitors for positions of Junior Professional Assistant, Legal Assistant, with an entrance grade of P-1 or CAF-5, or the equivalent.

A. Is the totally blind applicant physically capable of performing the duties of certain positions of Junior Professional Assistant, Legal Assistant, that are likely to be filled from competitors taken from the register?

Answer: Yes.

B. Is the total blindness of the applicant a defect or disease that would constitute an employment hazard to the applicant or to his fellow employees in the event that the applicant should be employed in a position of Junior Professional Assistant, Legal Assistant, that a totally blind person is physically capable of performing?

Answer: No.

C. Are there some positions of Junior Professional Assistant, Legal Assistant that a totally blind person would not be able to fill satisfactorily and other positions that a totally blind person would be able to fill satisfactorily?

Answer: Yes.

D. In your opinion is the total blindness of an applicant a reasonable cause for his removal from said register?

Answer: No.

101 E. In your opinion does the removal of a totally blind person from the register on account of blindness prevent his employment in certain positions of

Junior Professional Assistant, Legal Assistant with respect to which positions such totally blind person would otherwise have been qualified to compete for appointment with sighted persons?

Answer: Yes.

Attached:

Supplement (2 pages)

/s/ Donald H. Dabelstein
Donald H. Dabelstein

Subscribed and sworn to before me this 6th day of December, 1951.

/s/ Elsie W. Lewis
Notary Public

102 SUPPLEMENT

Deposition of Donald H. Dabelstein on
written interrogatories

Civil Action No. 3751-50

6. Answer: From September 5, 1935 to February 1, 1937, I was Director of Guidance in the Litchfield Public Schools, Litchfield, Minnesota.

From February 1937 to September 1938 I was Supervisor, Vocational Rehabilitation at the Saint Paul Department of Education, Saint Paul, Minnesota.

From September 1938 to February 1944 I was Director of the Minnesota Program of Vocational Rehabilitation.

From February 1, 1944, to August 1, 1944, I was Chief, Research and Statistics, Office of Vocational Rehabilitation, Federal Security Agency.

From August 1, 1944, to August 26, 1947, I was Chief, Advisement, Training and Placement Branch, Office of Vocational Rehabilitation, Federal Security Agency.

Since August 26, 1947, I have been Assistant Director, and Chief, Division of Rehabilitation Standards, Office of Vocational Rehabilitation, Federal Security Agency, which position I still hold. In this position I have responsibility for the technical supervision of the work of the office relating to the rehabilitation of the blind, including the establishment of standards for the rehabilitation of the blind as well as standards relating to the selection of activities in which blind persons may be successfully placed.

15. Answer: It is my understanding that there is a position in the Office of the General Counsel of the Federal Security Agency classified as "Legal Assistant GS-5." The description of duties for this position is as follows:

"Under close supervision by the Regional Attorney performs a variety of tasks in the Office of the Regional Attorney as an assistant to the attorneys of that office but neither prepares opinions nor renders legal advice; the performance of these tasks requires full legal training, a knowledge of general law but not admission to the bar; for example:

"Performs such elementary legal research as collecting state statutes on specific subjects, summarizing their provisions and comparing the variations from state to state for the use of attorneys in preparing reports or opinions.

"After research, prepares digests of court decisions, Attorney General opinions and provisions of constitutions as well as precedent opinions of the General Counsel for the use of attorneys in the preparation of reports or the consideration of questions referred to the General Counsel for opinion.

"Obtains information as to specific cases of statutes at the request of attorneys in the office, making such material available to the attorneys.

103 "Routinely prepares digests or summaries of current court decisions pertaining to the administra-

tion of agency programs for the use of attorneys in determining the legal effect of such decisions in the operation of the programs.

"Performs related duties."

It is also my understanding that there is still in existence in the Office of the General Counsel of the Federal Security Agency the position of "Junior Attorney GS-5," the duties of which are similar to those set forth for "Legal Assistant GS-5," above.

* * * *

104 Filed Dec 21 1951 Harry M. Hull, Clerk

*Deposition of Donald H. Dabelstein on Cross-
Interrogatories Propounded by Defendants*

DISTRICT OF COLUMBIA: SS

Donald H. Dabelstein, appearing as a witness for the plaintiff in the above-entitled cause, after being duly sworn according to law, on his oath, answers the following cross-interrogatories propounded to him by defendants.

(1) If your answers to Interrogatories 14 and 16 propounded by the plaintiff are in the affirmative, is it also your opinion that in order for a totally blind person to perform satisfactorily the duties of the positions referred to in said interrogatories, it would be necessary for some other person to assist such totally blind person by reading material to him and by performing visual research, whereas such assistance would not be required by a non-blind person occupying such positions?

Answer: Yes.

(2) If your answer to Interrogatory 18A propounded by the plaintiff is in the affirmative, is it also your opinion that in order for a totally blind person to perform satisfactorily the duties of the positions referred to in said

interrogatory it would be necessary for some other person to assist such totally blind person by reading material to him and by performing visual research, whereas such assistance would not be required by a non-blind person occupying such position?

Answer: Yes.

/s/ Donald H. Dabelstein
Donald H. Dabelstein

Subscribed and sworn to before me this 6th day of December 1951.

/s/ Elsie W. Lewis
Notary Public

* * * *

15 Filed Jul 1 1952 Harry M. Hull, Clerk

Stipulation of Facts

It is hereby stipulated and agreed by and between the parties hereto that the following facts shall be taken as true:

1. The plaintiff is a citizen of the United States residing in Sacramento, California. He has been totally blind from infancy. He is twenty-six years of age and enjoys normal good health and strength. He is a graduate of the University of California having obtained the degree of A.B. and L.L.B. from said University. He is a member of the Phi Beta Kappa honor society. At said University, he was a varsity debater and served as President of the University YMCA and as President of the Honor Students' Association. He is a member of the Bar of the State of California. He is skilled in the operation of a typewriter and a dictaphone. Prior to his admission to the Bar, he was employed for a short period by the United States Government as a Consulting Aide in the Civil Service Classification Grade of S.P-6, with the United States War Relocation Authority, until said office

was closed. This position was not one in the competitive civil service, and plaintiff did not take or pass any competitive civil service examination in connection with this position. Following his admission to the Bar, and since

February 1950, to the present date, the plaintiff has
16 been employed by the United States Government as an attorney in the Bureau of Reclamation, Department of the Interior. This position is excepted from the competitive Civil Service, and plaintiff did not take or pass any competitive civil service examinations in connection with this position. Plaintiff was originally employed in the Bureau of Reclamation in the Civil Service Classification Grade of GS-7 and by reason of promotions is presently in Grade GS-9. Plaintiff's efficiency ratings given to him in the course of his employment by the United States Government have been "Very Good" or better.

2. (a) The plaintiff has never been given a competitive status in the classified civil service

(b) Since July 1, 1950, the United States Civil Service Commission has been precluded by law from making permanent competitive civil service appointments.

3. On November 23, 1948, the United States Civil Service Commission issued Announcement No. 137, advertising that the Commission proposed to give competitive examinations designated under the general heading of Junior Professional Assistant. Said Announcement set forth that any person who had certain educational training and/or experience in any one or more of a number of specified fields, and who met certain other requirements, including age, citizenship and physical requirements, could qualify for such examinations. The physical requirements specified by the Commission in its Announcement No. 137 were as follows:

"Applicants must be physically capable of performing the duties of the position and be free from such defects or diseases as may constitute employment hazards to themselves or fellow employees. Persons with physical handicaps which they believe will not prevent their satisfactory performance of the duties of the position are invited to apply. Some positions require higher physical ability than others. Applicants who fail to meet the higher requirements may be disqualified for such positions, but their standing on the register and their eligibility for other positions will not be affected thereby."

17 A physical examination will be made by a Federal medical officer before appointment. Persons who are offered appointment must pay their own expenses in reporting for duty. If, upon reporting at the place of assignment, they are found ineligible because of physical defects, they cannot be appointed and no part of their expenses in returning home can be paid by the Government."

A copy of Announcement No. 137 is attached hereto and marked Exhibit A.

4. Said Announcement No. 137 set forth that separate registers or lists of eligibles would be established for the options, among others, of Junior Professional Assistant—Legal Assistant, Junior Professional Assistant—Trade Mark Examiner, Junior Professional Assistant—Economist, Junior Professional Assistant—Technical Editor (Physical Science), and that such separate registers would contain the names of all the persons who had passed the examination and who met the requirements for each option. Each said register was to be established for a different regional area or office of the Commission. Each person applying for said examinations was permitted to select the particular areas or offices for which registers he desired to qualify.

5. In accordance with its Announcement No. 137, the Commission did hold the examinations described therein and did establish registers or lists of eligible persons as therein announced. The plaintiff took the examinations for Junior Professional Assistant as set forth in said Announcement No. 137 for each of the following fields: (1) Legal Assistant, (2) Trade-Mark Examiner, (3) Economist, (4) Technical Editor (Physical Science). In accordance with the specifications in said Announcement, the plaintiff indicated that, if successful in said examinations, he sought to be placed on registers as follows:

Legal Assistant	Fourth Region
Trade-Mark Examiner	Central Office
Economist	Twelfth Region
Technical Editor (Physical Science).....	Central Office and Twelfth Region.

18 A sample of the type of such examinations is attached hereto and marked Exhibit B. In taking such examinations plaintiff had some other person read the questions to him and write in his answers in the appropriate spaces of the answer sheets.

6. Under date of May 26, 1949, plaintiff was notified by the Twelfth Region of the Commission that he had passed the examinations for Junior Professional Assistant-Technical Editor (with a rating of 77.5) and for Junior Professional Assistant-Economist (with a rating of 72.5) and that his name had been placed on the Twelfth Region registers of eligible competitors who had passed these examinations. A copy of this notice is attached hereto and marked Exhibit C.

7. Under date of June 24, 1949, plaintiff was notified by the Director of the Fourth United States Civil Service Region that he had passed the written examination for Junior Professional Assistant-Legal Assistant, CAF-5 (with a rating of 75.5), and that his name had been

placed on the Fourth Region register of eligible competitors who had passed that examination. A copy of said notice is attached hereto and marked Exhibit D.

8. Under date of July 19, 1949, the Chief of the Examining and Placement Division of the Commission notified the plaintiff that his applications for a place on the Central Office registers for Trade Mark Examiner and Technical Editor had been cancelled. A copy of this notice is attached hereto and marked Exhibit E.

9. Under date of August 1, 1949, the plaintiff wrote the Civil Service Commission a letter, a copy of which is attached hereto and marked Exhibit F.

10. Under date of August 2, 1949, the plaintiff wrote the Chief of the Examining and Placement Division of the Commission requesting reconsideration of the
19 rating made in the letter to the plaintiff dated July

19, 1949, from the Chief of the Examining and Placement Division. Plaintiff's letter was received by the Commission on August 24, 1949. A copy of this letter is attached hereto and marked Exhibit G.

11. Under date of August 8, 1949, the plaintiff was notified by the Regional Director of the Fourth United States Civil Service Region as follows:

"To accord with the action taken by the central office of the Civil Service Commission in cancelling your application of Trade Mark Examiner and Technical Editor, this office is reluctantly obligated to void your eligible rating of 75.50 on the Fourth Region register for Legal Assistant. The physical requirements for this position also include vision.

"The necessity for this unfavorable action is very much regretted."

12. Under date of August 11, 1949, the Twelfth Region of the Commission sent plaintiff a "Notice of Rating" with respect to his examination for Junior Professional Assistant, stating: "Ineligible—Per instruction from Central Office. Physical Disability. Eligibility therefore cancelled." A copy of this notice is attached hereto and marked Exhibit H.

13. Under date of August 17, 1949, the Executive Assistant of the Commission wrote a letter to plaintiff affirming the Commission's decision in its letter of July 19, 1949, to plaintiff. A copy of this letter of August 17, 1949, is attached hereto and marked Exhibit I.

14. Under date of August 31, 1949, the Executive Assistant of the Commission wrote plaintiff a letter replying to the plaintiff's letter to the Commission dated August 2 and affirming the Commission's decision. A copy of this letter dated August 31, 1949, is attached hereto and marked Exhibit J.

20 15. Under date of September 21, 1949, the Commission sent plaintiff a form letter stating that his rating in the examination for Junior Professional Assistant (Technical Editor) (Trade Mark Examiner) was "Cancelled—(physical condition)." A copy of this form letter dated September 21, 1949, is attached hereto and marked Exhibit K.

16. Under date of October 17, 1949, the plaintiff wrote a letter to the Chief of the Examining and Placement Division of the Commission requesting reconsideration of the Commission's rulings. A copy of this letter is attached hereto and marked Exhibit L.

17. Under date of December 12, 1949, the plaintiff wrote the Chief of the Examining and Placement Division of the Commission a letter urging action on his request for reconsideration. A copy of this letter is attached hereto and marked Exhibit M.

18. Under date of December 22, 1949, the Acting Chairman of the Board of Appeals and Review of the Commission wrote the plaintiff a letter stating that the Board of Appeals and Review had considered plaintiff's requests but that the finding of plaintiff's ineligibility for the positions of Trades Examiner, P-1, and Technical Editor, P-1, had been affirmed. A copy of this letter is attached hereto and marked Exhibit N.

19. Under date of February 24, 1950, the plaintiff wrote the Commission a letter requesting further reconsideration of his case. A copy of this letter is attached hereto and marked Exhibit O.

20. Under date of March 31, 1950, the Chairman of the Civil Service Commission wrote to plaintiff a letter in reply to the plaintiff's letter of February 24, 1950. A copy of this letter of March 31, 1950, is attached hereto and marked Exhibit P.

21. The Medical Division of the Civil Service Commission is charged with the operating responsibility of establishing physical standards to be applied by the Commission in connection with the various examinations announced by the Commission. Attached hereto and marked Exhibit Q are copies of the statements of "Physical Requirements" prescribed by the Medical Division on the following dates in connection with examinations for Junior Professional Assistant taken under Announcement No. 137: Legal Assistant option, February 9, 1948; Economist option, February 9, 1948; Technical Editor (Physical Science) option, August 26, 1948; Trade Mark Examiner option, March 31, 1949. For each option the "Duties Description" set forth in Exhibit Q is the same as the "Description of Work" set forth under the respective options in Announcement No. 137. For each option the "Comment" set forth in Exhibit Q represents the views of the Medical Division, as of the time

of Announcement No. 137 and subsequently, as to the appropriateness of the "Physical Requirements" in the light of job descriptions on file with the Commission for positions in the classified civil service which might be filled from the registers established by the Commission for the respective options. Each such "comment" was prepared in the form in which it appears in Exhibit Q by the Medical Division and the Examining Division for the purpose of setting forth the basis for the Commission's decision in this case; it was prepared from Examination Specification Sheets on file with the Commission at the time of Announcement No. 137, setting forth the several qualification requirements for the various positions therein referred to.

Exhibit Q also contains a statement of the reason why such "Physical Requirements" were prescribed by the Medical Division for the respective options; this statement was prepared by the Medical Division for the purpose of setting forth the basis for the Commission's decision in this case.

22 22. Plaintiff since his removal from said registers was not and is not now eligible to compete for any position now existing, or which hereafter may be created in the classified competitive civil service calling for the education and experience of a Junior Professional Assistant of the kinds for which said registers were established.

23. Attached hereto and marked Exhibit R is a copy of a letter dated July 13, 1950, written by the Acting Director of the Office of Vocational Rehabilitation, Federal Security Agency, to the Chairman of the Civil Service Commission in connection with plaintiff's efforts to be restored to said registers.

24. Attached hereto and marked Exhibit S is a copy of a letter dated August 25, 1950, written by the Execu-

tive Director of the Civil Service Commission to the Acting Director, Office of Vocational Rehabilitation, Federal Security Agency, replying to the latter's letter of July 13, 1950.

25. Attached hereto and marked Exhibit T is a copy of a letter dated April 10, 1951, from the Director of the Office of Vocational Rehabilitation, Federal Security Agency, to the Chairman of the Civil Service Commission in connection with plaintiff's efforts to be restored to said registers.

26. Attached hereto and marked Exhibit U is a copy of a letter dated June 5, 1951, from the Chairman of the Civil Service Commission to the Director of the Office of Vocational Rehabilitation, Federal Security Agency, replying to the latter's letter of April 10, 1951.

27. In 1943 the Board of Legal Examiners, created pursuant to Executive Order No. 8743 (6 F.R. 2117), conducted noncompetitive examinations for law clerk and attorney positions in the Government service. Persons determined by the Board of Legal Examiners to be

23 eligible were placed upon registers or lists of eligibles for appointment to positions in the Government service ranging from positions of Law Clerk Trainee in Grade CAF-4 through Attorney in Grade P-3. The Board of Legal Examiners did not give numerical ratings to persons determined to be eligible; all such persons were placed on registers without distinction as to rating or grade. The Board of Legal Examiners did not prescribe any physical qualifications whatever in connection with its non-competitive examinations. When a department or agency in the Government desired to fill a Law Clerk Trainee or Attorney position, it was free to select any person on the register, rather than being limited to making a selection from the three persons on the register having the highest numerical ratings, as in the

case of Civil Service Commission registers. The Board of Legal Examiners made special arrangements to allow totally blind persons to take these non-competitive examinations and placed such persons when successful upon its registers.

The positions (other than those of Law Clerk Trainee, the current equivalent of which is Junior Professional Assistant—Legal Assistant) formerly filled from the Board of Legal Examiners' registers were removed from the classified civil service by the Act of June 26, 1943 (57 Stat. 167, 173); and since the passage of that Act such positions have been filled by the departments and agencies of the Government without competitive examination.

28. In this case the depositions of Mr. Louis H. Rives, an attorney in the Office of the General Counsel of the Federal Security Agency, of Mr. Donald H. Dabelstein, Assistant Director and Chief, Division of Rehabilitation Standards, Office of Vocational Rehabilitation, Federal

23 Security Agency, have been taken upon interrogatories by the plaintiff and cross-interrogatories by the defendants. In addition Mr. William C. Hull, Executive Assistant to the Civil Service Commission, has answered interrogatories directed by plaintiff to the Commission. Said depositions and interrogatories have been filed in this action and it is agreed that if such persons were called as witnesses they would testify as stated in their respective depositions and interrogatories. The parties accept said depositions and answers to interrogatories as evidence as though said persons had so testified before the Court.

29. (a) Each department and agency in the Federal Government has the authority and responsibility to establish the various positions to be occupied by its employees and to prescribe the duties of each such position, but not to fix the classification and grade for each such position.

Such action by each department and agency is not subject to review or revision by the Civil Service Commission.

(b) The Civil Service Commission has the authority and responsibility to fix the classification and grade for each position in the classified civil service. The determination of the Civil Service Commission with respect to the classification of each such position in the classified civil service is final and determines the register from which applicants for each such position will be selected.

(c) All positions for trainees and beginners in the fields of law, economics, editing, and trademark examining are classified by the Civil Service Commission under the general category of Junior Professional Assistant positions. The Junior Professional Assistant registers are utilized to fill such positions when the appointing department or agency makes a new appointment by selection from the register as distinguished from filling the position by reinstatement, promotion or transfer.

25 30. Several departments and agencies of the Federal Government have employed or are currently employing, totally blind persons. No one of these persons was appointed from a Civil Service Commission register. Each of said positions was a position excepted from the competitive classified civil service. A statement of the said positions, together with a description of the duties of the position and the name of the blind occupant of the position where known is attached hereto and made Exhibit V. This stipulation does not intend to imply that Exhibit V either is or is not a complete list of positions in the Federal service occupied by blind persons.

COBB AND WEISSBRODT

By: /s/ David Cobb

DAVID COBB

Attorneys for Plaintiff

/s/ Holmes Baldridge
HOLMES BALDRIDGE
Assistant Attorney General

/s/ Edward Hickey
EDWARD H. HICKEY
Attorney, Department of
Justice

/s/ Donald B. MacGuineas
DONALD B. MacGUINEAS
Attorney, Department of
Justice
Attorneys for Defendants

Exhibit A

* * * *

29 Applicants must be physically capable of performing the duties of the position and be free of such defects or diseases as may constitute employment hazards to themselves or fellow employees. Persons with physical handicaps which they believe will not prevent their satisfactory performance of the duties of the position are invited to apply. *Some positions require higher physical ability than others. Applicants who fail to meet the higher requirements may be disqualified for such positions, but their standing on the register and their eligibility for other positions will not be affected thereby.*

A physical examination will be made by a Federal medical officer before appointment. Persons who are offered appointment must pay their own expenses in reporting for duty. If, upon reporting at the place of assignment, they are found ineligible because of physical defects, they cannot be appointed and no part of their expenses in returning home can be paid by the Government.

* * * *

46 A

31

Economist

The register resulting from the examination for Economist will be used to fill positions in the following fields: Business Economics, Foreign Affairs Economics, Forest Economics, Highway Economics, Labor Economics, Social Economics, International Trade Economics.

Description of Work

Economists will conduct elementary professional economic research, including the evaluation and briefing of expository data, the appraisal and compilation of statistical data, and the preparation of tentative economic reports on some phase of a major economic problem.

* * * *

32

Legal Assistant

The register resulting from the examination for Legal Assistant will be used to fill the following kinds of positions: Claims Examining, Docket Clerk, Legal Examining, Insurance Examining, Land Law Clerical and Administrative, Legal Clerical and Administrative, Legal Assistance and Adjudicating.

* * * *

34

Technical Editor (Physical Science)

Description of Work

Technical Editors will perform or assist in performing the following duties, with varying degrees of responsibility depending upon the difficulty of assignments: Editing, revising and preparing for printing technical publications, pamphlets, circulars, etc., editing and revising scientific manuscripts describing progress and results of technological research and investigations in such fields as aerodynamics, chemistry, mathematics, or physics; writing summaries and histories of research projects; studying, analyzing, and evaluating data; determining media and

47 A

method of presentation of material; preparing charts, graphs, etc., for inclusion in technical reports to produce intelligent and concise digests of studies; making recommendations as to practicability of publications; making recommendations to authors or officials as to improvements in quality or effectiveness of manuscripts; and perform related duties as assigned.

• • • •

35

Trade-Mark Examiner *Description of Work*

Trade-Mark Examiners will examine, study, and interpret specialized legal or technical applications for registrability of Trade-Marks, and make searches and compare reference material for determination of registrability.

• • • •

AN 3510

April 1947

SAMPLE QUESTIONS

The following sample questions show the types of questions that will be used in the written test. They show also how the questions in the test are to be answered. Read the directions below; then answer the sample questions. Record your answers on the Sample Answer Sheet on these pages. Then compare your answers with those given on the Correct Answers to Sample Questions.

Each sample question has a number of suggested answers lettered A, B, C, etc. Decide which one is the best answer to the question. Then, on the Sample Answer Sheet, find the answer space numbered to correspond with the number of the question and blacken the space between the lines lettered the same as the best suggested answer. Note that some of the questions have no suggested answer lettered E.

1. MANDATORY means most nearly

- (A) basic (D) discriminatory
(B) obligatory (E) advisory
(C) discretionary

2. SURVEILLANCE means most nearly

- (A) continued confinement
(B) indefinite parole
(C) constant protection
(D) unwarranted suspicion
(E) close supervision

3. (Reading) "Whenever two groups of people whose interests at the moment conflict meet to discuss a solution of that conflict, there is laid the basis for an interchange of facts and ideas which increases the total range of knowledge of both parties and tends to break down the barrier which their restricted field of information has helped to create."

Select the alternative that is best supported by the quotation. Conflicts between two parties may be brought closer to a settlement through

- (A) frank acknowledgment of error
(B) the exchange of accusations
(C) gaining a wider knowledge of facts
(D) submitting the dispute to an impartial judge
(E) limiting discussion to plans acceptable to both groups

4. (Reading) "One of the primary steps in the development of management in any enterprise is proper organization. After the business has been conceived and the broad policies that are to be pursued have been established, before any operating methods may be devised at least a skeleton organization must be developed."

Select the alternative that is best supported by the quotation. In industry, some kind of organization is necessary in order that

- (A) the type of enterprise may be decided upon
(B) policies may be established
(C) routine work may be planned
(D) capital may be invested
(E) a manager may be selected

In questions like 5 and 6 select the sentence that is preferable with respect to grammar and good usage in a formal letter or report.

5. (A) Although that statement is true, I did not leave it influence my decision.
(B) My decision is not effected by that statement, even though it is true.
(C) Although true, I have not let that statement influence my decision.
(D) That statement is true, but it does not affect my decision.
(E) Because that statement is true does not have any effect on my decision.
6. (A) Our activities this month have been as interesting, if not more interesting than those of any other month this year.
(B) Our activities this year have seldom ever been as interesting as they have been this month.
(C) Our activities this month have been more interesting than those of any other month this year.
(D) Our activities this month have been more interesting, or at least as interesting as those of any month this year.
(E) This month's activities have been more interesting than any previous month during the year.

Sample Answer Sheet

	A	B	C	D	E
1	:	:	:	:	:
2	:	:	:	:	:
3	:	:	:	:	:
4	:	:	:	:	:
5	:	:	:	:	:
6	:	:	:	:	:

Correct Answers to Sample Questions

	A	B	C	D	E
1	:	:	:	:	:
2	:	:	:	:	:
3	:	:	:	:	:
4	:	:	:	:	:
5	:	:	:	:	:
6	:	:	:	:	:

TABLE 1. 25 YEARS OLD AND OVER BY OCCUPATIONAL GROUPS, 1870-1930
(In thousands)

Occupational group	1870	1880	1890	1900	1910	1920	1930
Total.....	12, 164	16, 274	21, 814	27, 223	35, 845	40, 798	48, 163
Farming.....	6, 376	7, 746	8, 815	9, 628	10, 653	10, 277	10, 010
Forestry and fishing.....	82	84	158	174	219	247	232
Mining.....	172	252	388	576	947	1, 063	988
Manufacturing.....	2, 674	4, 032	5, 743	7, 537	10, 253	12, 425	13, 790
Trade.....	628	1, 047	1, 686	2, 735	3, 447	4, 215	6, 094
Transportation and communication.....	476	664	1, 263	1, 710	2, 776	3, 145	3, 866
Clerical occupations.....	206	330	543	781	1, 625	2, 953	3, 935
Domestic and personal service.....	1, 168	1, 437	2, 123	2, 726	3, 806	3, 605	4, 448
Professional service.....	328	543	880	1, 196	1, 727	2, 308	3, 110
Public service not elsewhere classified.....	73	107	185	280	383	643	682

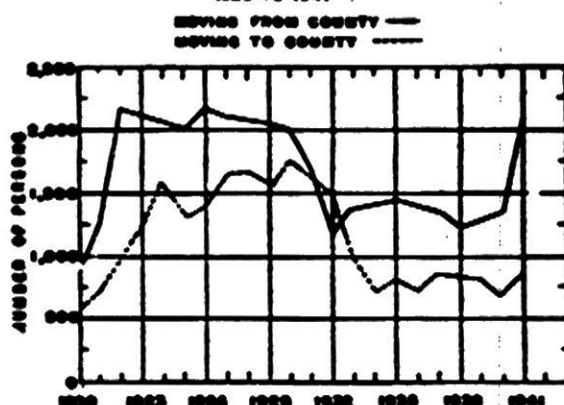
7. According to the above table, the occupational group that in 1930 showed the greatest proportional increase over its size in 1870 is

(A) manufacturing
(B) trade
(C) clerical occupations
(D) domestic and personal service
(E) professional service

8. The graph at the right indicates that, with respect to County X, migratory activities during the period from 1920 to 1941 tended mostly to result in

(A) population gains
(B) population losses
(C) gradual stabilization of population
(D) irregular fluctuations in population without consistent direction
(E) cycles of alternating losses and gains in population, which tended to balance each other

POPULATION MOVEMENT TO AND FROM COUNTY X
1920 TO 1941



9. The weight of water is 62.4 pounds per cubic foot. What is the weight of the water that fills a rectangular container 6 inches by 6 inches by 1 foot?

(A) 22.3 pounds
(B) 15.6 pounds
(C) 10.4 pounds
(D) 12.48 pounds
(E) none of these

10. The inventor of a machine which operates by solar heat claims that it accumulates heat in the day time at the rate of 19 units an hour on sunny days and 3 units an hour on cloudy days. During rain there is no accumulation of heat. In July there were 23 hours of daylight rain and 42 hours of cloudy daylight. Assuming on the average 13 hours of daylight per day in July, how many units could the machine have accumulated that month?

(A) 330
(B) 468
(C) 3,516
(D) 2,810
(E) none of these

Sample Answer Sheet

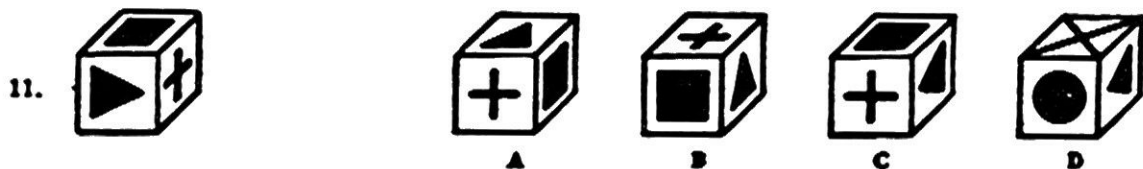
7	A	B	C	D	E
8	A	B	C	D	E
9	A	B	C	D	E
10	A	B	C	D	E
11	A	B	C	D	E
12	A	B	C	D	E
13	A	B	C	D	E
14	A	B	C	D	E

Correct Answers to Sample Questions

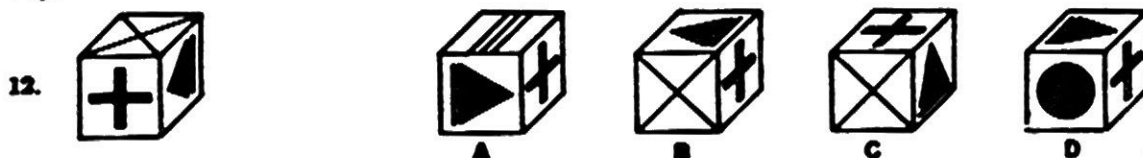
7	A	B	C	D	E
8	A	B	C	D	E
9	A	B	C	D	E
10	A	B	C	D	E
11	A	B	C	D	E
12	A	B	C	D	E
13	A	B	C	D	E
14	A	B	C	D	E

The drawing at the left is one of the two following sample questions. It presents a cube. There is a different design on each of the six faces of the cube.

The problem is to find the one of the four cubes, A, B, C, or D, which could possibly be the cube on the left turned to a different position. (The cube at the left may have been turned over, it may have been turned around, or it may have been turned both over and around and faces not seen in the drawing at the left may become visible.)

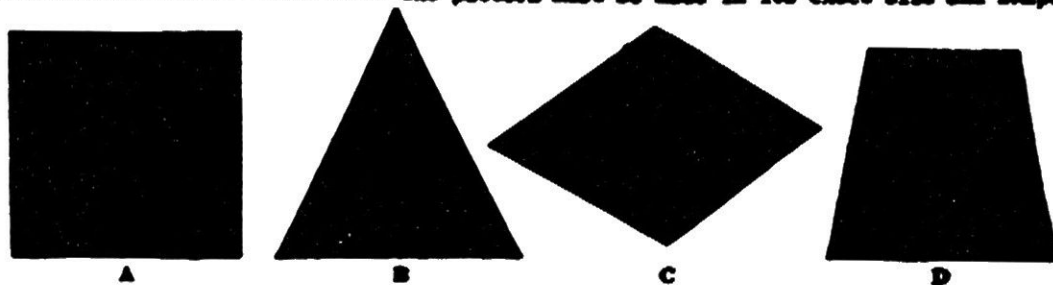


In sample question 11 you will notice that only B could be the same cube as that shown on the left. Study the sample carefully and observe that B is the cube on the left turned in a different position. Remember that there is a different design on each face of the cube. Sample question 12 is done in the same way.

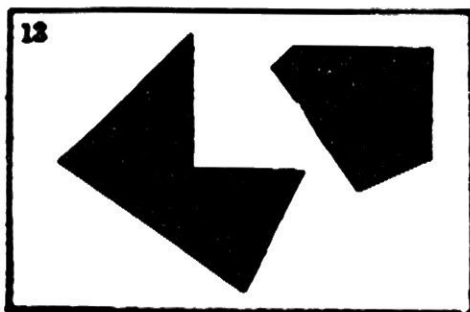


Four solid patterns, lettered A, B, C, and D, are shown below.

Each of questions 13 and 14 shows one of these four patterns cut up into pieces. For each question, decide which one of the four patterns could be made by fitting all of the pieces together without having any edges overlap and without leaving any space between pieces. Some of the pieces may need to be turned around or turned over to make them fit. The pattern must be made in its exact size and shape.



Look at sample question 13. If the two pieces were fitted together they would make pattern D. The piece on the left fits at the bottom of pattern D, and the piece at the right is turned around and over to make the top of the pattern.



In each of the two following questions, at the left there is a series of seven letters which follow some definite order, and at the right there are five sets of two letters each. Look at the letters in the series and determine what the order is; then, from the suggested answers at the right, select the set that gives the next two letters in the series. Next to the question number on the Sample Answer Sheet blacken the space that has the same letter as the set you have chosen.

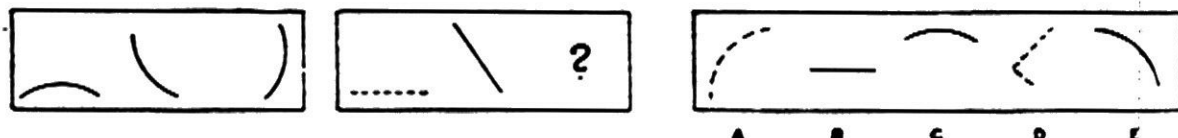
15. X C X D X E X (A) F X (B) F G (C) X F (D) E F (E) X G

In question 15 only A could be the answer because the series consists of X's alternating with letters in alphabetical order. Sample question 16 is done in the same way.

16. A B D C E F H (A) G H (B) I G (C) G I (D) K L (E) I H

Each of questions 17 and 18 has two boxes at the left. Each symbol in the first box is like the others in that box in some way. Each symbol in the second box is like the other in that box in some way. But the characteristic feature of each symbol in the first box is different from the characteristic feature of each symbol in the second box. The first box has three symbols, and the second box has two symbols, with one missing symbol represented by a question mark. You are to decide what the difference between the symbols in the first box and the symbols in the second box is, and then choose the lettered symbol A, B, C, D, or E, in the third box, which can best take the place of the missing symbol in the second box.

17.



Look at question 17. In this question, all the symbols in the first box are curved, while the symbols in the second box are straight. Of the lettered symbols in the third box, only B is straight, so B should be marked on the Sample Answer Sheet. (Note that although one symbol in the second box is made of dashes, the other is not, and so a dashed type of line is not the difference between the two boxes.) Sample question 18 is done in the same way.

18.



Sample Answer Sheet					
	A	B	C	D	E
15	:	:	:	:	:
16	:	:	:	:	:
17	:	:	:	:	:
18	:	:	:	:	:

Correct Answers to Sample Questions					
	A	B	C	D	E
15	■	:	:	:	:
16	:	■	:	:	:
17	:	■	:	:	:
18	■	:	:	:	:

Address only
"Civil Service Commission"
in your reply refer to
FILE X:S:MM:nm
and date of this letter

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

July 19, 1949

Mr. Russell Redfield Kletzing
2239 Channing Way
Berkeley 4, California

Dear Mr. Kletzing:

Reference is made to the applications for the Junior Professional Assistant examination which you filed with the Commission's Twelfth Regional Office. Two of these applications were referred by that office to the Central Office of the Commission, in accordance with your request that your name be placed on the registers established here for Trade Mark Examiner and Technical Editor, in case you were found to be eligible.

In reviewing your applications we have noted your statement that you are totally blind. Your qualifications have been carefully and sympathetically evaluated in the light of the duties which are performed by Technical Editors and Trade Mark Examiners. The duties for each of these positions are such that they could not be performed by a blind individual without assistance. Accordingly it is regretted that it has been necessary to cancel your application for these two positions.

Sincerely yours,

W. A. McCoy, Chief
Examining and Placement
Division

Exhibit F

2239 Channing Way
Berkeley 4, Calif.

Aug. 1, 1949

Mr. Connor
Room 303 Civil Service Building
Seventh and F. St.
Washington 25, D. C.

Dear Mr. Connor:

I am still very much interested in employment in Washington, as I was when I talked to you on July 1. You then undertook to find out why I had not been placed on the Central Office Register for Technical Editor and Trademark Examiner, tho I had passed the Junior Professional Assistant examination, and been placed on the register for the Twelfth Region for Technical Editor and Economist.

I have just received word in a letter signed by R. A. McCoy, Chief Examination and Placement, July 19, 1949, file number X:S'MM-nm. This letter explained that I had not been placed on the eligible list because the duties of Technical Editor and Trademark Examiner could not be performed by a blind person without assistance. I would appreciate it very much if you would advise me how I may obtain a review of this decision. I believe that the Commission might reverse it if I could place before them the plan by which I hope to perform Federal work; that is, by means of a reader paid for at my own expense. Also, this plan was successful in my four months experience with the War Relocation Authority. I am sure that I can do the work involved, and I want to call these facts to the attention of the Commission.

Yours very truly,

/s/ Russell Kletzing
Russell [sic] Kletzing

COPY

2239 Channing Way
Berkeley 4, Calif.

Aug. 2, 1949

In Re File No. X:S:MM:nm, July 19, 1949

Mr. W. A. McCoy

Chief Examining and Placement Commission
United States Civil Service Commission
Washington 25, D. C.

I wish to request reconsideration of the ruling made July 19, 1949, File No. X:S:MM:nm, in which I was disqualified for positions as Technical Editor and Trademark Examiner because of Blindness. I feel that in view of the additional facts which follow you will decide in my favor after reconsideration.

Although I am totally blind, I am absolutely sure that I can perform the duties of Technical Editor or Trademark Examiner with complete competence. I would propose to employ a reader at my own expense to whatever extent might be necessary. This was the system which I used successfully during my employment with the United States Government War Relocation Authority, from which I received a rating of "good." A great many blind people have employed successfully the same technique in their work in State and Federal government. Furthermore I wish to remind you that I had been held qualified, until revocation on express orders from the Central Office, for Technical Editor and Economist in the Twelfth Region, and for Legal Assistant in the Fourth.

The treatment to which I have been subjected is the type of discrimination which has most seriously hampered the placement of blind people. It seems to me that it is grossly inconsistent that the Federal Government should spend large sums for rehabilitation and education of the

blind, and yet arbitrarily refuse employment to them in Civil Service positions outside the Department of Rehabilitation. I have been peremptorily denied the opportunity for employment in jobs which I am sure, from my previous experiences, that I could perform efficiently. It is my understanding that a blind person can be denied a Civil Service rating only if it is believed that he cannot perform the duties of the job. It seems only fair to me that if the Board holds such a belief that it is incumbent upon them to set forth in detail the reasons for it, so that answer can be made in detail.

Yours very truly,

/s/ Russell Kletzing
Russell Kletzing

RECEIVED
AUG 24 1949
U.S.C.S.C.
M. & F. SEC.

52

Exhibit 'I'

Address only
"Civil Service Commission"
In your reply refer to
FILE X,XP:AAW:rs
and date of this letter

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

August 17, 1949

Mr. Russell Kletzing
2239 Channing Way
Berkeley 4, California

Dear Mr. Kletzing,

This has reference to your letter of August 1, 1949 addressed to Mr. Connor of the Commission's staff concerning our letter of July 19, 1949. As was explained in

our letter of July 19, your application for the positions of Trade Mark Examiner P-1 and Technical Editor P-1 were cancelled because the duties to be performed in those positions in the Government service are such that they cannot be fully performed by a blind person. You indicated in your letter that you had hoped to be able to perform the duties of such positions by means of a reader paid for at your own expense.

The positions of Technical Editor and Trade Mark Examiner at the P-1 level are such as to require the use of sight for the major and most important aspects of the duties. In determining the eligibility and relative qualifications of competitors to perform the work of these positions, the Commission cannot consider as eligible any person who would have to depend on assistance and would not, therefore, be able to perform them adequately himself, aside from the question of legality which might be raised in view of Comptroller General's decisions on the general subject of outside persons performing Government work. Although a careful review and reconsideration has been made with respect to your case, we must advise you that our original decision is affirmed.

Sincerely yours,

Wm. C. Hull
Executive Assistant

53

Exhibit J

Address only
"Civil Service Commission"
in your reply refer to
FILE X.XP:AAW:rs
and date of this letter

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

August 31, 1949

Mr. Russell Kletzing

2239 Channing Way
Berkeley 4, California

Dear Mr. Kletzing:

This has reference to your recent letter addressed to the Chief of the Examining and Placement Division of the Commission regarding the ineligible rating that you were assigned in the Trade Mark Examiner P-1 and Technical Editor P-1 examinations. On August 17, we made a reply to your letter of August 1, 1949, addressed to Mr. Connor of the Commission's staff on the same subject.

It is believed that your reply of August 17 also covers the questions you raised in the later letter. As has been pointed out, the Commission, in determining the eligibility and relative qualifications of competitors to perform the work of the positions of Technical Editor and Trade Mark Examiner at the P-1 level, cannot consider as eligible any persons who would have to depend on assistance to perform the duties of the positions and who would not, therefore, be able to perform them fully and adequately by himself. We explained that the positions of Technical Editor and Trade Mark Examiner are such as to require the use of sight for the major and most important aspects of the duties. We must advise you that our original decision is affirmed.

Sincerely yours,

Wm. C. Hull
Executive Assistant

COPY

2239 Channing Way
Berkeley 4, Calif.

Oct. 17, 1949

Mr. W. A. McCoy
Chief Examining and Placement Commission
United States Civil Service Commission
Seventh and F Streets
Washington 25, D. C.

Dear Mr. McCoy:

I have received correspondence from your office with file numbers as follows: X:X:MM:nm, July 19, 1949; X.XT: AAW:rs, Aug. 17, 1949; X.XT:AAW:rs, Aug. 31, 1949; X.SR:EIS:cb, Sept. 21, 1949. These communications have constituted a denial to me of ratings as P-1 Technical Editor and Trademark Examiner, though I have received a passing grade on the Junior Professional Assistant examination, and a refusal to reconsider this ruling. In addition, on orders from the Central Office, the Fourth Regional Office has cancelled my previous eligible rating for P-1 Legal Assistant, and the Twelfth Regional Office has cancelled my previous eligible rating for P-1 Technical Editor and Economist. The only reason assigned for these actions was my total blindness.

I feel that this type of discrimination is so serious that I should set forth my position in full, and for the same reasons I hope that you will conduct a full and careful re-investigation of the policy which these rulings express. Continuance of such a policy will in effect deprive me and all blind persons of consideration for all government jobs.

Law and public policy forbid discrimination in government employment because of blindness. The Congress has expressed this policy in 5 U. S. C. 633, 62 Stat. 351,

requiring equal treatment for qualified handicapped persons in Civil Service placement. The Congress has also authorized the expenditure of large sums of money to help finance state rehabilitation programs for the blind, to educate them and to place them in gainful employment. Such programs can have only a reduced effectiveness if qualified blind people, educated under them, are denied consideration for Administrative and professional jobs on the Federal level.

Freedom from discrimination of course does not require that blind applicants be hired for all Federal jobs for which they apply; that is, they need not be hired for jobs for which sight is indispensable. However, it does mean that they should be hired when qualified and able
55 to perform the duties of a position adequately.

What does "performing work" mean? Does it mean doing work with one's own hands and one's own eyes—one's own physical performance? If so anyone using a dictaphone, stenographer, typewriter, automobile etc. is not performing work and should be fired; but such a conclusion is ridiculous. Everyone must rely on other persons and tools in doing his work. The reasonable definition must be that an employe is "performing work" if (1) he does the task with his own mental faculties or supervises its doing by others, and (2) he exercises the degree of control and ability to produce performance necessary to discharge the responsibilities of his position. It is apparent, then, that for most jobs the use of another's eyes is not a disqualification.

In performing the duties of the positions for which I have applied I propose to employ a reader at my own expense—that is, to employ a pair of eyes. I am convinced, and willing to demonstrate, that with the aid of another's eyes I can perform the duties of these positions. The listed duties for these positions include none

which a qualified blind person, with the aid of a reader, cannot perform.

The letters of rejection written to me by the United States Civil Service Commission are so general as to render impossible any review by other persons in the Commission, by the courts, or by the recipient of the letters, of the issue as to whether a blind person can perform the tasks involved in the jobs. As a matter of fair treatment of applicants, as matter of administrative policy by the Commission, and perhaps as a matter of Constitutional right of the applicant, the Commission should set forth with particularity the tasks involved in the jobs which a blind person cannot perform. The simple formula that there are such tasks, or that blind persons cannot fulfill them "fully and adequately" is certainly not enough.

I should be happy to receive from the Commission a copy of the ruling by the Comptroller General regarding the performance of government work by outsiders, referred to in your letter with file number X.XT:AAW:rs, Aug. 17, 1949, . . . Almost certainly it was not intended to exclude the employment of a reader by a blind employee, and if so intended its conformity with United States law must be determined.

56 In view of the foregoing considerations I trust you will carefully reexamine your decision as to my rating for the positions for which I have applied. If you should decline to reverse your previous decision, please advise me as to the method of administrative appeal open to me and forward to me the necessary forms.

Yours very truly,

/s/ Russell Kletzing
Russell Kletzing

Exhibit N

December 22, 1949

Mr. Russell Kletzing
2239 Channing Way
Berkeley 4, California

Dear Mr. Kletzing:

Reference is made to your letters of October 17, 1949 and December 12, 1949, in regard to the action taken by the Commission in rating you ineligible for Trade Mark Examiner, P-1, and Technical Editor, P-1, because you do not meet the physical requirements for these positions.

Your letters have been referred to the Board of Appeals and Review of this office for consideration and reply. As you are aware, the duties of the foregoing mentioned positions require use of the eyes. You have pointed out that you would be able to function in these positions despite your lack of vision if you were permitted to employ a reader at your own expense. The Commission does not have available for furnishing to applicants, copies of the ruling of the Comptroller General regarding the performance of Government work by outsiders. However, volumes containing the decisions and rulings of the Comptroller General are probably available in a public or university library in your vicinity, and the particular rulings referred to in letter of August 17, 1949, File X.XP:AAW:rs, are contained in Volumes 6, page 140; 9: 67; 11:252; 14: 909; 16: 1045.9

The Board has given careful consideration to the facts in your case, but regrets to advise you that no basis has been found upon which to base a determination that you meet the physical requirements for Trades Examiner,

P-1, and Technical Editor, P-1, and finding of ineligibility for these positions has been affirmed.

Very respectfully,

/s/ ENS

E. Newton Steely,
Acting Chairman
Board of Appeals and
Review

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Exhibit O

1916 Cedar Street
Berkeley 9, California

February 24, 1950

United States Civil Service Commission
Seventh and F Streets
Washington 25, D. C.

Gentlemen:

I respectfully wish to appeal to the Civil Service Commission from the decision of the Board of Appeals and Review (File No. BAR:EPT:BGL, Dec. 22, 1949) affirming the ruling of the Examining and Placement Commission (File No. X:S:MM:nm, July 19, 1949) denying me the ratings of P-1 Technical Editor and Trademark Examiner, and the subsequent refusals of reconsideration.¹ I further request that the Commission order by reinstatement on the register of the Fourth Civil Service Region where my eligible rating as P-1 Legal Assistant (June 24, 1949) was revoked on orders from the Central Office File No. XPS:HMF:mdk, Aug. 8, 1949), and on the register of the Twelfth Civil Service Region where my eligible ratings as P-1 Economist and Technical Editor (File No. XR:rh, May 26, 1949) were also revoked on orders from the Central Office (File No. XR:bj, Aug. 11, 1949). The appeal and the request for reinstatement on the regional

registers present but one question, the refusal of the applicant because of a physical handicap for similar professional positions.

I am physically handicapped; I am blind. Because of my blindness the Examining and Placement Commission has refused me eligible ratings for Federal Civil Service positions.

The problem of the physically handicapped is a problem of the nation—of private industry and of government. It is a social problem which two costly wars have aggravated and forced to the forefront of public attention. In the case of the blind it is almost entirely occupational in character, a problem of employment. It is a problem of the blind training and educating themselves for useful employment, and of society finding jobs in which its blind citizens can serve it, not because they are blind but despite their blindness, and in a degree strictly commensurate with their ability to perform. It is a problem of eliminating a tremendous social waste—of man-resources, moral values, self-respect and human dignity. To allow qualified employable blind persons to languish by the thousands on the public assistance pension rolls, in the humiliating position of charity wards of society, is an extravagance which our society—no society—can longer afford. A public realization has now developed that the blind must be allowed to move from the degrading position of utilizing collective resources without opportunity to contribute to them to a position as useful members of society making their contribution to the common welfare and to the moral strength of the nation. This goal can only be accomplished by affording job opportunities to the blind.

¹ File No. s: X.XT:AAW:rs, Aug. 17, 1949; X.XT:AAW:rs, Aug. 31, 1949; X.SR:EIS:cb, Sept. 21, 1949.

This realization has manifested itself on a national level in the grant-in-aid program for vocational rehabilitation and in the President's Committee for the Employment of the Physically Handicapped. This committee has been created in order to utilize the maximum possible resources to develop employment opportunities for the physically handicapped, and to develop public awareness of that need. The presidentially proclaimed "employ the physically handicapped week," celebrated last fall under the sponsorship of the committee, was designed to focus national attention on the immediate, pressing need to take definite, concrete action to develop job opportunities for this class of people. On the state level, too, great strides are being made in the direction of public consciousness and official action, as evidenced by the coordinate state rehabilitation programs and by manifold more localized projects.

The problem of employing the blind is one of education, not only of the blind themselves, but also of the members of society who must determine who shall occupy its jobs. There is a long and regrettable record of discrimination in the employment of the blind, not through ill will, but with nonetheless disastrous results. In professional and commercial employment, in skilled and unskilled labor, in industry and in government, the blind have been prevented from taking their place, have been kept on the outside. It would be folly for a government to employ the blind where their performance is substandard, but it is still more culpable to exclude qualified blind applicants from positions where they can perform the duties satisfactorily; it is equally culpable to assume without trial that a blind applicant cannot perform the duties adequately.

The decisions here appealed from are primarily based on the ground that ". . . you do not meet the physical requirements for these positions." ". . . The duties to be

performed . . . are such that they cannot fully be performed by a blind person.”²

Although I have requested a clarification and explanation of these generalities, none has been forthcoming. The letters of rejection from the Examining and Placement Commission and the Board of Appeals and Review are so general as to render impossible any review by other persons, by the Commission, by the courts or by the recipient of the letters, of the issue as to whether a blind person can perform the tasks involved in these jobs. As a matter of fair treatment of applicants, as a matter of administrative policy of the Commission, and perhaps as a matter of constitutional right of the applicants, the Commission should set forth with particularity the tasks involved
60 in the jobs which a blind person could not perform.

The simple formula that there are such tasks, or that a blind person could not fulfill them “fully” is certainly not enough.

The Congress has designated the public policy to be followed by the Civil Service Commission in considering handicapped applicants. “No person shall be discriminated against in any case because of any physical handicap, in examination, appointment, . . . with respect to any position the duties of which, in the opinion of the Civil Service Commission, may be efficiently performed by a person with such a physical handicap; *and provided* further, that such employment will not be hazardous to the appointee or endanger the health or safety of his fellow employees or others.”³ Clearly the final proviso can have no possible application to the case of a blind person seeking professional office employment.

² See letters to the applicant File No. S: BAR:EPT:BGL, Dec. 22, 1949; X.XT:AAW:rs, Aug. 17, 1949.

³ 62 Stat. 351 (1948) 5 U. S. C. X. s633 (2) (9).

The report to the Senate from its Committee on Civil Service and Post Office says of this legislation:⁴

"The committee is of the definite belief that any measure designed to eliminate or minimize discriminations arising solely from the physical condition of any applicant for 'examination, appointment . . .' is in line with American standards and that the example needs first to be set by the government of all the people.

"There is no question that handicapped persons take their places of responsibility in time of national stress and discharge their responsibilities and obligations with great credit, many of them displaying rare skills and talents which the Government finds extremely scarce during emergencies.

"... The committee feels no need for dwelling at length upon the virtues of the legislation which speaks for itself.

"A recent study by the United States Bureau of Labor Statistics piles up further evidence that handicapped employees are good workers when properly placed. The Bureau's figures show that handicapped workers are even slightly superior to their fellow employees on efficiency ratings and on attendance, and that handicapped workers have fewer disabling injuries than non-handicapped."

The report,⁵ to which the committee referred, states further: "When given reasonable job placement consideration . . . the physically impaired workers as a group were able to compete successfully with unimpaired work-

⁴ Sen. Rep. No. 1222, to accompany HR4236, 80th Cong. Apr. 30, 1948.

⁵ Performance of Physically Impaired Workers in Manufacturing Industries (1948) prepared by the Bureau of Labor Statistics for the Veterans Administration, pp. 3, 4, 43.

ers similarly placed.” “Based upon the record it
 61 seems “reasonable to conclude that physical impairment did not produce an adverse effect either on the quantity of work produced or the quality of work performance. No matter how different these physically impaired workers may have been in other respects, on the job they were just another group of workers able to meet their fellow workers on an equal competitive footing.” The report demonstrates that blind workers, as compared with the unimpaired control group, had a somewhat better production record, equally good attendance, and somewhat fewer disabling injuries. The blind were able to compete successfully with other workers and were not handicapped in work performance.

To this the Civil Service Commission adds:°

“The Commission’s medical officers conducted an on the job survey of the work performance of 2,858 physically impaired men and women employees and of 5,523 able-bodied men and women workers of similar age, experience, and occupational characteristics. It was found that production both in quantity and quality and the efficiency ratings of the physically impaired compared favorably with those of the able-bodied.”

* * * *

“There are numerous cases on the Federal rolls of blind persons and amputees rendering completely satisfactory service.”

The House Committee report on the same bill says in part:⁷

“The purpose of this bill is to prevent discrimination against physically handicapped persons who are employed

° The Disabled Veteran in Federal Civil Service (Sept. 1946) prepared by United States Civil Service Commission, p. 4.

⁷ House Rep. No. 1092, to accompany HR4236, 80th Cong., July 25, 1947, House Misc. Reports, V. 5.

in or seeking employment with, the Federal Government. In recommending this proposed legislation the committee wishes to encourage the department and agencies of the Government to employ physically handicapped persons wherever possible.

• • • •

“Under the proposed legislation the Civil Service Commission will be given the authority and the responsibility for seeing to it that physically handicapped persons are not rejected for Government service merely because they do not meet the minimum physical standards, if such employees can perform the duties of positions for which they are being hired.”

The law which the congress has passed is intended to end discrimination under Civil Service with regard
62 to all the physically handicapped. It is true that the Commission is given discretion so that they need not employ every such applicant, but it is made crystal clear that this discretion is to be used to promote, not to hinder and prevent, their employment. At most such discretion is very limited and circumscribed, only that of the finder of facts. “In the opinion of the Commission” can signify only that it is the body to make the determination of the ability of an impaired applicant to perform the duties of a position, a determination which must not be capricious or arbitrary, but in accordance with sound administrative and constitutional law, and supported by the weight of the evidence. The Commission is given no discretion whatsoever when, in their opinion, a handicapped person could perform the duties of the position sought. Under such circumstances it is the duty of the Commission to ensure, in the words of the committee, “that physically handicapped persons are not rejected for Government positions merely because they do not meet the physical requirements for these positions.” Yet the only ground advanced for the affirmance of pre-

vious rulings by the Board of Appeals and Review was that "You do not meet the physical requirements for these positions."

The lists for Technical Editor, Trademark Examiner, Economist and Legal Assistant are used to fill hundreds of different positions with scores of Federal agencies. It is impossible that Congress intended that a blind applicant should be rejected perfunctorily for all positions by a simple statement of failure to meet the physical requirements. The very least that could have been intended is that the Commission would carefully consider the duties of each position to which the blind applicant was eligible for certification as the opening occurred, and then determine whether his handicap would allow him to perform them efficiently.

The Civil Service Commission has said in a report⁸ prepared by it, that it "looks upon the employment of handicapped persons as a continuing obligation." "The Commission can say today to those with physical handicaps 'If you have the faculties and the abilities which are needed for a particular job, we will put you in that job irrespective of the handicaps you have.'" "The Commission will continue, in peacetime, the policy of promoting the effective and judicious utilization of the physically impaired in the Federal Government." Elsewhere it adds:⁹ "For the past several years the Commission has pointedly encouraged the employment of physically impaired persons."

The action of the Placement Commission in perfunctorily cancelling my ratings, without considering the duties of particular openings, seems something less than

⁸ See Report note 6, *supra*, pp. 9, 13.

⁹ House Rep. No. 1092, note 7, *supra*, quoting from Report prepared by Civil Service Commission on HR4236.

pointed encouragement. Moreover I believe that I have demonstrated my ability to perform the duties of the classes of positions to which I seek appointment both as to the education and examination. I have completed the educational prerequisites for the positions in question, and have received a passing grade on the only required examination, that titled Junior Professional Assistant. With a sight applicant the examination score plus educational achievements are considered conclusive, in this class of positions, of his ability to perform the work. They should be considered just as conclusive in the case of a blind applicant, for he participates in the examination under the same conditions as those under which he would perform the duties of the position; that is, he utilizes the services of a reader.

The Congress may well have thought it necessary to set up special Civil Service safeguards for the employment of the blind and other handicapped persons because of the difficulty of the untrained layman in judging their capabilities. Most laymen would say that a blind person could not possibly hold a position as manager of a sanatorium, office manager, contractor, manager of a trucking agency, sales manager or editor of a poultry magazine, or do legal research. Yet in a report¹⁰ authorized by the California Legislature and prepared by the heads of State Departments, it is shown that blind persons occupy all these seemingly impossible jobs and many more. Perhaps to prevent this type of ready administrative error the Congress has acted to prevent discrimination based on physical disability alone.

As quoted above, The Civil Service Commission has acknowledged that many blind employees are currently rendering praiseworthy service in Federal employment.

¹⁰ Report of Inter-departmental Committee on study of problems of and services for the blind (Dec. 1946) pp. 110-114 enclosed herewith.

Some, at least, of these are employed in professional capacities, with duties which include many of the same type as those of an employee in the positions now in question. I am given no chance to show that I can perform the duties of any particular job when my ratings are peremptorily cancelled and no given position is taken into consideration by the Placement Commission. If the Commission restores my ratings and informs me of openings to which I am eligible for certification, I will endeavor to demonstrate my ability to discharge their duties satisfactorily, if I believe that I possess such. Of course, except by actual trial on the job, I cannot prove conclusively and incontrovertibly that I can perform such duties efficiently, nor can any sighted applicant. But likewise without actual trial it cannot be shown that any blind (or sighted) applicant cannot so perform.

I propose, and so informed the Placement Commission and Board of Appeals, to employ a sighted reader at my own expense. That is to say, I propose to employ a pair of eyes to translate visual perceptions into words, wherever this shall be necessary in the scope of my duties. By this method I believe that I can fully and adequately perform the duties of the positions for which I have applied.

To this proposal the Placement Commission chivalrously replied that it "cannot consider as eligible any person who would have to depend on assistance to perform the duties of the position, and who would
64 not be able to perform them fully and adequately by himself."¹¹

What does "performing work" mean? Does it mean doing work with one's own hands and one's own eyes—one's own physical performance? If so anyone using a dictaphone, stenographer, typewriter or automobile is not

¹¹ File No. X. XT:AAW:rs, Aug. 31, 1949

performing work and should be fired; but such a result is ridiculous. Everyone must rely on other persons and tools in doing his work.

Let us assume, for illustration, that a Treasury official responsible for preparing Treasury checks, fills in the blanks personally with pen and ink. Already he is using a tool, but who would say he is not performing his work. Assume instead he completes them on a check-writing machine, or even orders the machine to be operated by a subordinate at his dictation; still he is performing. However the probable situation is that he okays a list of amounts and payees, and directs clerks to prepare the checks with the machine, and that he never sees the checks themselves at all. It is his duty to prepare Treasury checks, and he would be the first to laugh if it was suggested that he was derelict in using such a method or that he should write every word and figure with his own hand. A blind employee's reader does far, far less than the assistants of this official, and equally it must be concluded that utilizing such reader, the blind person is still performing his work.

The reasonable definition must be that an employee is "performing work" if (1) he does the tasks with his own mental faculties or supervises their doing by others, and (2) he exercises the degree of control and ability to produce performance necessary to discharge the responsibilities of his position. It is apparent then, that for most professional jobs the use of another's eyes is not a disqualification. The listed duties of the positions for which I have applied include none which a qualified blind person cannot perform, utilizing the eyes of a reader, and I am convinced that I can "perform" them in this manner.

To bolster their view, five decisions of the Comptroller were sighted by the Placement Commission, on the subject of outsiders doing Government work, which allegedly

raised a possible legal obstacle in the case of a blind person utilizing a reader. These decisions are so remotely related to that problem as almost to call into question the good faith of anybody urging them seriously; however, let us consider them individually.

The two most recent¹² decide respectively that an agency may not contract with a city to have architects furnished to the agency chosen by the city, and that an agency may not contract with a commercial service to serve it during the evening hours, but must keep some of its own messenger staff on duty if it desires service during that period. The argument is that an outside agent, the architect selected by the city or the commercial messenger service, may not perform duties which
 65 are classed as personal service. Such cases in no way resemble that of the reader utilized by a blind person in Federal employ, for that reader does not do Government work—he exercises no discretion, makes no decisions, and creates no thoughts, but instead acts only as a conduit between the printed page and the blind employee.

A third decision rules that a board of tea inspectors, composed of one regular Government employee and two experts employed to do inspection on a contract basis, was illegal, saying:¹³ “. . . any procedure by which the final determination in such matters could be controlled by the action of two persons who are not responsible to the Government is unauthorized.” Here again it is clear that the illegal feature is the exercise of discretion, in this case controlling discretion, by civilians, a situation entirely different from the utilization of a reader by a blind

¹² (1935) 14 Comp Gen. 909; (1937) 16 Comp. Gen. 1049.

¹³ (1926) 6 Comp Gen. 140, 142

employee. The other two decisions¹⁴ do not bear upon the question at all, for they involve the sole issue as to whether in one case a tree surgeon, and in the other a bank investigator, could be employed on a contract basis after the submission of bids, or whether they must be hired through Civil Service channels; the decision ordered the latter course. No comment can serve to emphasize the clear inaptness of such precedents.

The five decisions urged by the Placement Commission, ranging in date from thirteen to twenty-four years ago, do not cover situations analogous to that of a blind employee and his reader. Even if they presented highly parallel cases on their facts, these decisions could not have been intended to cover the question here presented, where the social considerations and public policy create such an overwhelming argument for allowing a blind person to employ his own reader. When Congress forbade discrimination in the employment of handicapped persons if the Civil Service Commission believed that they could perform their duties efficiently, they could have not intended that such a hypertechnical distinction should be set up to exclude them, a conclusion borne out by the committee reports quoted above. To persist in the policy of requiring every duty to be performed by the body of the employee alone will in effect deprive me and every blind person of consideration for all Government jobs, and will require the dismissal of the many blind now employed by the Federal Government, including those in the Vocational Rehabilitation program. Is this not the very type of discrimination that Congress acted to prevent?

Again and again the Civil Service Commission has publicly committed itself to the policy of promoting the employment of the physically handicapped in Government

¹⁴ (1929) 9 Comp Gen. 67; (1931) 11 Comp. Gen. 252

service. Such words are empty indeed unless backed up by actions. The Commission is here presented with a case where the applicant has been summarily denied any opportunity for employment under Civil Service, without considering whether he could perform the duties of particular positions—contrary to the national interest, contrary to public policy, contrary to the public utterances of the Commission, and contrary to the law of the United States. Simple justice demands that the Commission act to right this error.

I respectfully request the Commission to reverse the ruling of the Board of Appeals and Review, and to order my reinstatement on the registers of the Fourth and Twelfth Civil Service Regions.

Yours very truly,

/s/ Russell Kletzing
Russell Kletzing

67

Exhibit P

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

March 31, 1950

Mr. Russell Kletzing
1916 Cedar Street
Berkeley 9, California

Dear Mr. Kletzing:

We have given the most careful consideration to your letter of February 24, 1950 in which you state your reasons for believing that your name should be restored to the registers from which it was removed and that you be permitted to work for the government, the idea being that you would, out of your own funds, engage a reader.

It is obvious, of course, that you could not yourself perform all of the duties of the position for which you desire to be considered. The very fact that you would have to engage a reader means that there is at least one function of the positions, reading, that you could not perform yourself.

Reading the material in connection with the project on which you would have to work is normally a regular part of the work to be performed by the government employee. Any reader which you would engage would to this extent be performing government work. Since he would be performing government work as part of a job in a government agency he would have to be employed by the government. There is no legal authority for a government employee paying someone else for performing any duty which the employee as a part of his regular job must perform himself. In other words, the reader would have to be a government employee, appointed by the agency in which you would work.

Section 66 of Title 5 of the United States Code provides that no government employee (and the reader would have to be a government employee) shall receive any salary in connection with his service as such employee from any source other than the government of the United States. The notes to Section 66 show that the courts have held that no government employee may, consistently with this section, receive in connection with his services, pay from any private source.

The Commission has been exerting every effort to encourage government departments to employ the physically handicapped where it is shown that the person can perform the duties of the position. Unfortunately, the circumstances in your case are such that the Commission cannot say that you would be able to perform the duties of the positions for which you have applied.

I regret not being able to send you a more favorable report.

Very sincerely yours,

/s/ Harry B. Mitchell
Harry B. Mitchell
Chairman

68

Exhibit Q

Reason Why the "Civil Service Commission Determined to Exclude Blind Persons as Physically Unqualified to Perform the Duties of the Positions on the Register From Which Plaintiff Was Excluded."

Since 1942, the basic objective of the Commission's physical standards has been to get appointees who, at the time of entrance on duty, were capable physically of performing efficiently the duties of the position without hazard to themselves or others. In its job analysis studies of the physical components of the particular jobs, and in the establishment of standards, the Commission has followed the precept of establishing minimum physical requirements while still operating in conformity with the several laws and numerous regulations which govern appointments to competitive positions in the Federal Civil Service.

As in all of the requirements established by the Commission, whether they cover experience, training, performance and other types of tests, or whether they cover physical standards, the determination of eligibility is based on the applicant's ability to do the job. An eligible when certified to an agency is presumed to be, on the basis of all evidence available at that stage, qualified to do the agency's job without the assignment of additional employees to assist him in getting the job done. Thus total loss of vision is acceptable in the case of a Transcribing Machine Operator since the job to be done and the basis

on which the grade and salary of the position is assigned, involve a function which can be wholly performed by a blind person. The fact that administrative or supervisory instructions incidental to government employment must be given orally to the blind person when they can be given in writing to the sighted person does not disqualify the blind individual for this position because the duties which form the basis for his grade and salary under the position Classification Act are duties which he can perform since the material he must transcribe is always given to him orally.

The attachment to this memoranda gives the duties' statements and the physical requirements for each option selected by Mr. Kletzing in his application for the JPA examination A-137. It should be noted that the duties' statements for Economist and Legal Assistant cover several classification series to which specific positions in the Federal service would be assigned. In the case of the Legal Assistant some of the series are quite dissimilar to other series included in the same option. However, in all cases the definition of the option which appeared in the announcement is an accurate description of the various types of positions included in that option.

It obviously does not require a medical opinion to determine that the majority of the "doing" parts of the duties descriptions in the attachment require vision, i.e., the conduct of elemental professional economic research, the examination and review of claims filed against the Federal Government, the docketing, indexing and filing of legal papers, the editing and revising of technical papers, etc. Some of the duties described in the attachment involve evaluation or appraisal functions which would not necessarily require the use of the eyes if the material to be evaluated or appraised was presented to the incumbent orally. When such duties occur in the positions described at GS-5 and GS-6 the material

to be evaluated or appraised, is in written form. In addition, at these grades such duties occur together with other duties requiring vision.

70 LEGAL ASSISTANT

Duties Statement:

Legal Assistants will perform legal, quasi-legal, or legal clerical work which involves the examination, review, or adjudication of claims filed with or against the Federal Government under various laws, or regulations having the force of law, for rights, benefits, gratuities, payment, or other relief. They will also perform clerical work necessary in the receipt, docketing, indexing, and filing of legal papers connected with proceedings instituted before a court, board, commission, or other body which possesses judicial or quasi-judicial powers.

Physical Requirements:

Applicants must be physically able to perform efficiently the duties of the position, which are described elsewhere in this announcement. Good distant vision in one eye and ability to read without strain printed material the size of typewritten characters are required, glasses permitted. Ability to hear the conversational voice, with or without a hearing aid, is required. In most instances, an amputation of arm, hand, leg, or foot will not disqualify an applicant for appointment, although it may be necessary that this condition be compensated by use of satisfactory prosthesis. Applicants must possess emotional and mental stability. Any physical condition which would cause the applicant to be a hazard to himself or to others will disqualify for appointment.

Comment:

Eight classification series are covered in the announcement by the title and duties description given above.

They were: GS-961 Claims Examiner; GS-946 Docket Clerk; GS-963 Legal Examiner; GS-964 Insurance Examiner, various specialties; GS-965 Land Law Clerical and Administrative; GS-986 Law Clerk; GS-954 Legal Assistant, General; GS-960 Adjudicator, various specialties. The Docket Clerk GS-946 and Law Clerk GS-986 involve responsible clerical duties such as receiving, docketing, indexing and filing legal papers, and the digesting and indexing of legal material, or responsibility for supervising others engaged in this activity. The Insurance Examiner, Legal Assistant and Adjudicator series involve no supervision or very little. The Insurance Examiner and Adjudicator usually work alone and take action finally on the material they examine, while the Legal Assistant usually reads, digests, and classifies material for the use of an attorney. The Claims Examiner GS-961 and Legal Examiner GS-963 involve difficult clerical work in the examination, development and adjudication of claims or the examination of various legal papers, for sufficiency in accordance with pertinent law, or the supervision of persons engaged in this work.

Note: No class. spec. in Med. Div. for Land Law Clerical and Administrative Series GS-965.

- 71 *Duties Statements and Physical Requirement Paragraphs for Options Under the Junior Professional Assistant Examination A-137, Issued November 23, 1948.*

ECONOMIST

Duties Statement:

Economists will conduct elementary professional economic research, including the evaluation and briefing of expository data, the appraisal and compilation of statistical data, and the preparation of tentative economic reports on some phase of a major economic problem.

Physical Requirements:

Applicants must be physically able to perform the duties of the position which are described elsewhere in this announcement. Good distant vision in one eye, and ability to read without strain printed material the size of typewritten characters are required, glasses permitted. Ability to hear the conversational voice, with or without a hearing aid is required for most positions; however, some positions may be suitable for the deaf. In most instances, an amputation of arm, hand, leg, or foot will not disqualify an applicant for appointment, although it may be necessary that this condition be compensated by use of satisfactory prosthesis. Any physical condition which would cause the applicant to be a hazard to himself or to others, or which would prevent efficient performance of the duties of the position, will disqualify for appointment.

Comment:

Seven classification series are covered in the announcement by the broad title and duties description given above. They were: GS-111, Business Economist; GS-113 Fiscal and Financial Economist; GS-118 Forest Economist; various specialties; GS-112 International Economist; GS-116 Labor Economist; GS-114 Public Utilities Economist; GS-115 Transportation Economist. The descriptions generally follow the broad descriptions given above. The research work is sometimes done as a research assistant to economists of higher grade and sometimes as a member of a research group with responsibility for a particular phase of the research project. The organization and compilation of data usually involve tabulating statistics, preparing sample tables, and graphs, etc. Supervision of others, e.g., statistical clerks and other clerical personnel, is not usually a regularly recurring component of the P-1 or GS-5 grade; when it occurs it is on an individual assignment basis. The International

Economist series, GS-112, describes positions at the GS-5 level as serving as research assistants to economists of a higher level with duties partly clerical in nature, e.g., maintaining or assisting in the maintenance of reference files pertinent to the work of the organization.

Note: No Class. Spec. in Med. Div. for Public Utilities Economist, GS-114.

72 TECHNICAL EDITOR (PHYSICAL SCIENCE)

Duties Statement:

Technical Editors will perform or assist in performing the following duties with varying degrees of responsibility depending upon the difficulty of assignments:

Edit, revise, and prepare for printing technical publications, pamphlets, circulars, etc.; edit and revise scientific manuscripts describing progress and results of technological research and investigations in such fields as aerodynamics, chemistry, mathematics, or physics; write summaries and histories of research projects; study, analyze and evaluate data; determine media and method of presentation of material; prepare charts, graphs, etc., for inclusion in technical reports to produce intelligent and concise digests of studies; recommend as to practicability of publications; make recommendations to authors or officials as to improvements in quality or effectiveness of manuscripts; and perform related duties as assigned.

Physical Requirements:

The duties of the positions require light to moderate physical exertion involving work which is largely sedentary in nature; however, applicants must be capable of moving about within an office with reasonable ease. Arms, hands, legs, and feet must be sufficiently intact and functioning in order that applicants may perform the duties satisfactorily. Vision, with or without glasses, must be

sufficiently acute and near vision, glasses permitted must be acute for reading without strain printed material the size of typewritten characters, to permit the applicant to render satisfactory services. The duties of most positions named in this announcement require the ability of the applicant to hear the conversational voice, with or without a hearing aid. However, there may be some positions which do not require this ability and deaf applicants will receive consideration.

Any physical condition which would render the applicant a hazard to himself or others or which would prevent efficient performance of the duties of the position will disqualify for appointment.

Comment:

P. C. D. advises that this series has been abolished—formerly P-1366.

73 TRADE MARK EXAMINER

Duties description:

Trade-Mark Examiners will examine, study, and interpret specialized legal or technical applications for registrability of Trade-Marks, and make searches and compare reference material for determination of registrability.

Physical Requirements:

Applicants must be physically able to perform the duties of the position, which are described elsewhere in this announcement. Good distant vision in one eye, and ability to read without strain printed material the size of typewritten characters, are required, glasses permitted. Ability to hear the conversational voice, with or without a hearing aid, is required for most positions; however, some positions may be suitable for the deaf. In most instances, an amputation of arm, hand, leg, or foot will not disqualify an applicant for appointment although it

may be necessary that this condition be compensated by use of satisfactory prosthesis.

Any physical condition which would render the applicant a hazard to himself or others, or which would prevent efficient performance of the duties of the position will disqualify for appointment.

Comment:

Class Specifications are GS-1241. The GS-5 grade appears to be concerned primarily with training. The description of duties implies that the examining work could not be performed by a reader since "the training given in the methods and techniques of recognizing pictorial and phonetic similarities of marks * * *," a quote from the class specification, appears to acquire the application of sight.

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C O P Y

FEDERAL SECURITY AGENCY
Office of Vocational Rehabilitation
Washington 25, D. C.

July 13, 1950

EXHIBIT R

Honorable Harry B. Mitchell, Chairman
United States Civil Service Commission
Washington 25, D. C.

Dear Mr. Mitchell:

Recently there was brought to our attention the appeal of Mr. Russell Kletzing of 1916 Cedar Street, Berkeley, California, for the restoration of his name to three registers from which it had been removed. The specific lists for which he had qualified are: technical editor and trade mark examiner, legal assistant and economist and technical editor.

His claim appears to be that action of the Commission

in removing his name from these lists without considering the duties of particular openings was discriminatory and, therefore, in conflict with Public Law 617, 80th Congress.

In the course of inquiring into the facts surrounding Mr. Kletzing's case a related, and in our opinion a more far reaching practice of the Commission with respect to the employment of blind applicants has come to our attention. It appears to be the practice of the Commission to include in many examination announcements the statement, "good distant vision in one eye and ability to read without strain printed material the size of typewritten characters are required, glasses permitted."

If in fact this is the Commission's practice, or if it appears in certain examination announcements without thorough investigation of the physical requirements of the position, or consideration of the fact that many related positions may be filled from these registers, then the practice would appear to us to be inconsistent with both the letter and spirit of Public Law 617, 80th Congress. Furthermore, it would seem to be in conflict with the policy of the President's Committee on the Employment of the Physically Handicapped and in fact the publicly announced policy of the Civil Service Commission of promoting the effective and judicious utilization of the physically impaired in the federal government.

The categorical exclusion of the blind from the opportunity to qualify for government positions in competition with others and without regard to requirements of individual positions or to the fact that numbers of blind individuals are now successfully and satisfactorily employed in government positions is in our judgment discriminatory.

75 In view of our legal responsibility for the rehabilitation of the blind, we urge a re-examination

of this practice and its revision to bring it into line with present knowledge regarding the ability of the blind to function in a wide variety of positions in the federal government. Such a revision of practice would bring the federal government into line with the policy of progressive employers who believe that the blind can work in carefully selected jobs.

Sincerely yours,
/s/ John A. Kratz
John A. Kratz
Acting Director

76

EXHIBIT S

Mr. John A. Kratz
Acting Director
Federal Security Agency
Office of Vocational Rehabilitation
Washington 25, D. C.

Dear Mr. Kratz:

In Mr. Mitchell's absence from the city, I am replying to your letter of July 13, 1950, in which you discuss the case of Mr. Russell Kletzing of 1916 Cedar Street, Berkeley, California, whose applications for several options of the Junior Professional Assistant examination in 1948 were cancelled because he did not meet the minimum physical abilities required to perform the duties of the position.

The options for which Mr. Kletzing applied, under Announcement A-137, as stated in your letter, were: economist, legal assistant, technical editor, and trade-mark examiner. In determining the physical requirements for these positions, a study of the duties revealed that the work involved was sedentary in nature, requiring light physical exertion. In all these positions it was found that

the incumbent must be able to read in order to perform efficiently. It was also found that although the majority of these positions required that the incumbent must be able to hear the conversational voice, with or without a hearing aid, some positions existed under all options, except the economist, which would not require this ability.

In line with our policy of establishing minimum physical standards for positions in the competitive service, we therefore established physical standards for these options which permitted the acceptance of applications from individuals with such physical impairments as amputations, orthopedic disabilities, defective vision including total blindness in one eye, and defective hearing including total deafness (for all options except economist, where total deafness would prevent efficient performance of the duties involved). In the light of adherence to our policy, these standards recognize only the basic or absolutely essential physical requirements for these positions, and it is difficult to understand how the Commission's action on Mr. Kletzing's applications, as well as his subsequent appeals, can be classed as discriminatory or not consonant with the spirit of Public Law 617.

With regard to your comments to the effect that it appears to be the practice of the Commission to include a routine standard on vision in many examination announcements without regard to the duties of the positions

77 covered by the announcement, we can only state that such a concept is directly opposed to the policies and practices followed by the Commission since the beginning of our program for the placement of the physically impaired. On the other hand, it is understandable that the statement you quoted in your letter might give rise to such an impression, since that statement denotes the acceptance of a degree of visual impairment which would include total blindness of one eye. It is desired to point out that in carrying out the practice previously re-

ferred to of prescribing physical standards of a minimal rather than a maximal type, such a statement appears in all of our published examination announcements where studies of the positions covered have revealed that this low degree of visual acuity would permit the efficient performance of the duties involved.

There is an implication in your letter that the physical requirements set for our examinations may be too high for some of the positions that may possibly be filled from the register. We announce, as you know, an examination for the purpose of establishing a register of eligibles who are fully qualified to perform the duties of the positions covered by the announcement. We give very careful study to the qualification requirements of our examinations. This applies to physical ability requirements as well as the requirements of experience and education and the use of various types of written examinations. For all practical purposes, the use of the resulting register is confined to filling positions encompassed within those described in the announcement. In a very few cases a register may be used for a position not so covered; but before doing this we would have to determine that it was a related position and required substantially the same abilities, knowledges, and other qualifications. The possibility of a register established on the basis of requiring sufficiently acute vision as to permit reading typewritten material, for example, being used for positions that do not require at least that much vision, is virtually nonexistent.

Sincerely yours,

L. A. Moyer
Executive Director

• • • •

June 5, 1951

Miss Mary E. Switzer, Director
Federal Security Agency
Office of Vocational Rehabilitation
Washington 25, D. C.

Dear Miss Switzer:

I must apologize to you for the delay in acknowledging your letter of April 10th and for Mr. Moyer, to whom I sent your letter for a report because he lost track of it for a while.

After reviewing this matter it is my opinion that the Commission is correct in regard to Mr. Russell Kletzing. No doubt, there are positions in the Government for which he could be qualified but I do not believe that it would be proper to qualify him for the one in question.

The Commission, since the beginning of World War II, has pioneered in the placement of the physically handicapped. This has been accomplished by matching the physical abilities of handicapped persons with the particular physical skills required to perform satisfactorily the duties of the jobs to be filled. The work of the Commission in this field has been recognized by the Disabled Veterans Organizations and other organizations in this country and abroad that are concerned with work opportunities for the physically handicapped.

Our policy is to examine the handicapped for any positions, the duties of which they can perform in a satisfactory manner. This realistic approach to the problem has overcome, to a considerable extent, reluctance on the part of appointing officers to the selection of handicapped persons and has resulted in the placement of thousands of such persons.

Of course I will be glad to discuss this matter with you at some time mutually convenient. If you will have your secretary call mine, Code 171, Extensions 201 or 202, we can arrange a date.

With best wishes, I am

Sincerely yours,
Robert Ramspeck
Chairman

RR:eha

. . . .

117 Filed Oct 23 1952 Harry M. Hull, Clerk

Plaintiff's Motion for Summary Judgment

The plaintiff, on the basis of the pleadings herein and the Stipulation of Facts and exhibits, depositions and interrogatories referred to therein, respectfully moves the Court for summary judgment for the reasons stated in plaintiff's memorandum of points and authorities submitted herewith in support of plaintiff's motion.

Respectfully submitted:

COBB AND WEISSBRODT
1822 Jefferson Place, N.W.
Washington 6, D. C.

By: /s/ David Cobb
David Cobb

/s/ I. S. Weissbrodt
I. S. Weissbrodt

/s/ Abe W. Weissbrodt
Abe W. Weissbrodt
Attorneys for Plaintiff

Leave to file Granted Bastian J.

. . . .

118 Filed Nov 3 1952 Harry M. Hull, Clerk

Defendants' Motion for Summary Judgment

Now come defendants, by their counsel, and move the Court for summary judgment on the following grounds:

1. The case is moot.

2. There is no justiciable case or controversy.

3. The determination of the Civil Service Commission that blind persons cannot efficiently perform Junior Professional Assistant jobs was the exercise of discretion vested in the Commission by law. The Court has no jurisdiction to reexamine the Commission's determination by mandamus or declaratory judgment.

4. The action of the Commission in removing plaintiff from the civil service registers did not constitute any discrimination against the blind in contravention of 5 U.S.C. 633(9).

The Court is respectfully referred to the affidavit of William C. Hull and the memorandum of points and authorities filed in support of this motion.

/s/ Holmes Baldridge
Assistant Attorney General

/s/ Edward H. Hickey
Edward H. Hickey
Attorney, Department of Justice

/s/ Donald B. MacGuineas
Donald B. MacGuineas
Attorney, Department of Justice
Attorneys for Defendants

Leave to file Granted Bastian J.

120 Filed Nov 3 1952 Harry M. Hull, Clerk

*Affidavit in Support of Defendants' Motion for
Summary Judgment*

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) SS:

I, William C. Hull, being duly sworn depose and say:

1. I am the Executive Assistant to the U. S. Civil Service Commissioners.

2. The official files and records of the U. S. Civil Service Commission show that the Junior Professional Assistant, Legal Assistant register established by the Fourth Regional Office of the Commission as a result of the examination conducted under Announcement No. 137 of November 23, 1948, duly expired on October 1, 1952.

3. The official files and records of the U. S. Civil Service Commission show that the Junior Professional Assistant, Trade Mark Examiner register established by the Central Office of the Commission as a result of the examination conducted under Announcement No. 137 of November 23, 1948, duly expired on October 9, 1952.

4. The registers referred to in paragraphs 1 and 2 above were expired in accordance with the Commission's usual practice because they had been in existence well over one year and they were no longer being utilized by the departments and agencies to fill existing vacancies.

121 5. Any vacancies in positions such as those described in the various options of the Junior Professional Assistant register which may exist in any of the Executive departments and agencies may also be filled by the transfer or promotion of an employee already in the competitive civil service, or by the reinstatement of a

former employee who had a previously acquired competitive civil service status, provided that such employee or former employee has the appropriate qualifications.

6. To this date the U. S. Civil Service Commission has not received requests for certification from competitive civil service registers to fill any positions of the type covered by the Junior Professional Assistant options, the duties of which would permit them to be filled by a blind person. If departments or agencies should in the future make requests for certifications of this nature the Commission would either (a) permit such positions to be filled by non-competitive examinations such as those held under Schedule B of the Civil Service Rules and Regulations (5 CFR 6.200); or (b) change the physical standard requirements in future examinations to reflect the basic change in physical qualifications indicated by the employing departments or agencies in their requests.

7. The Commission's standards applied to competitive examination announcements, such as Announcement No. 137 of November 23, 1948, reflect the physical requirements necessary to fill positions then in existence as shown by the requests for certification received by the several departments and agencies. No action of the U. S. Civil Service Commission would prevent any department or agency from creating a position or group of positions the duties of which do not require particular physical requirements such as sight. If any department or agency were to in fact create such a position or group of positions the Commission would take the action set forth in paragraphs 5 and 6 of this affidavit.

/s/ William C. Hull
William C. Hull
Executive Assistant

Subscribed and sworn to before me, a notary public, in and for the District of Columbia, this 31st day of October, 1952.

/s/ Armon G. Clement
Notary Public

My Commission Expires Sept. 14, 1957.

122 Filed Feb 3 1953 Harry M. Hull, Clerk

Order

This cause having been submitted to the Court on plaintiff's and defendants' respective motions for summary judgment, and it appearing that the cause is moot in that all of the Civil Service registers to which plaintiff seeks to be restored have been expired by the Civil Service Commission in accordance with its usual practice because they were no longer being utilized by the departments and agencies to fill vacancies,

NOW, THEREFORE, it is hereby ordered, adjudged, and decreed that defendants' motion for summary judgment is hereby granted and the complaint is hereby dismissed on the ground that the cause is moot.

/s/ Matthew F. McGuire
MATTHEW F. McGUIRE
District Judge

Dated: February 3, 1953

* * * *

123 Filed Mar 25 1953 Harry M. Hull, Clerk

Notice of Appeal

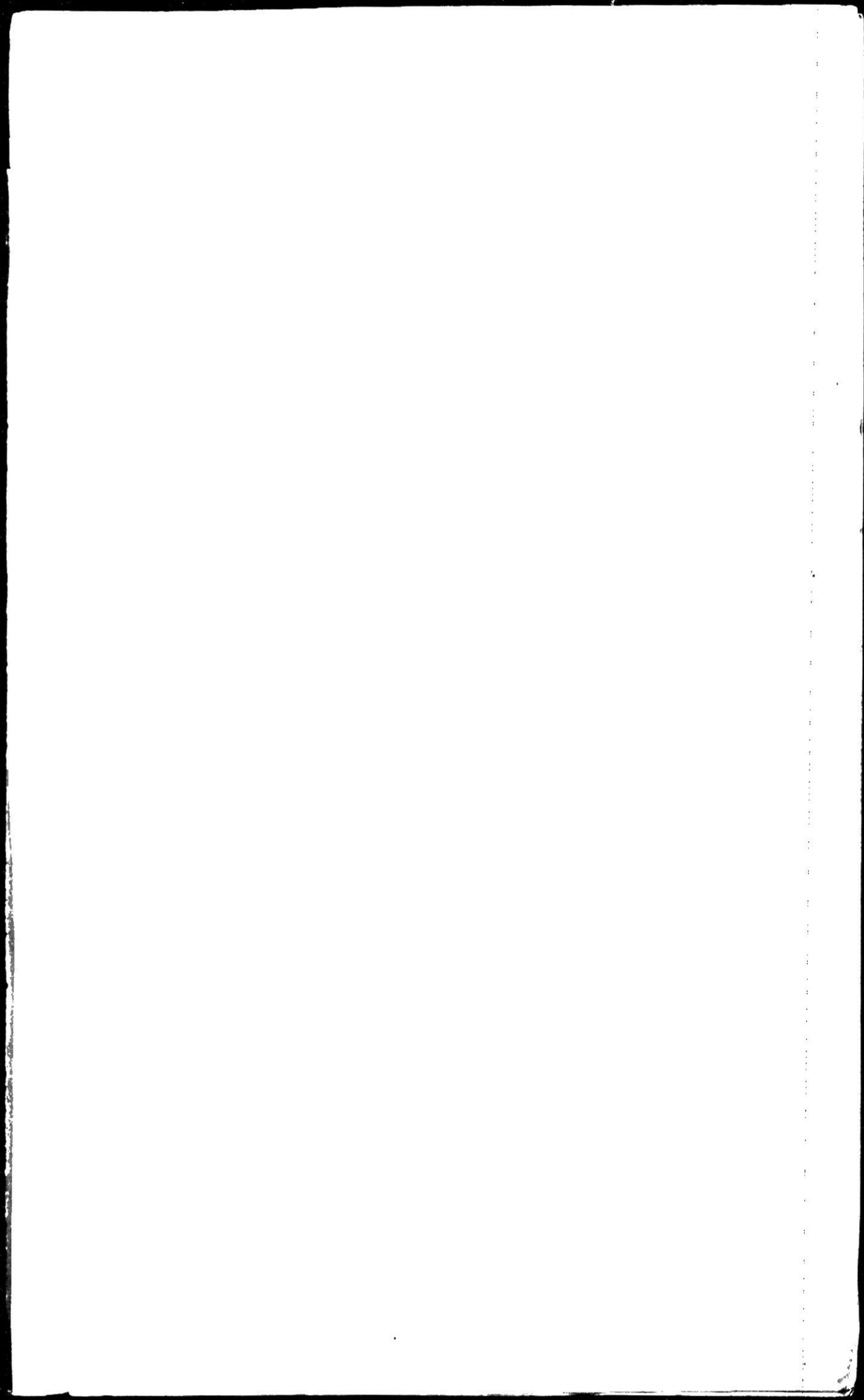
Notice is hereby given this 25th day of March, 1953, that Russell Redfield Kletzing, plaintiff above named, hereby appeals to the United States Court of Appeals for

the District of Columbia from the judgment of this Court entered on the 3rd day of February, 1953 in favor of the defendants above named against said plaintiff.

COBB AND WEISSBRODT
1822 Jefferson Place, N. W.
Washington 6, D. C.

By: DAVID COBB

• • • •



No. 11,845

APPELLANT'S BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RUSSELL REDFIELD KLETZING, *Appellant*

v.

ROBERT RAMSPECK, Chairman, United States Civil Service
Commission, et al., *Appellees*

**Appeal from the United States District Court
for the District of Columbia**

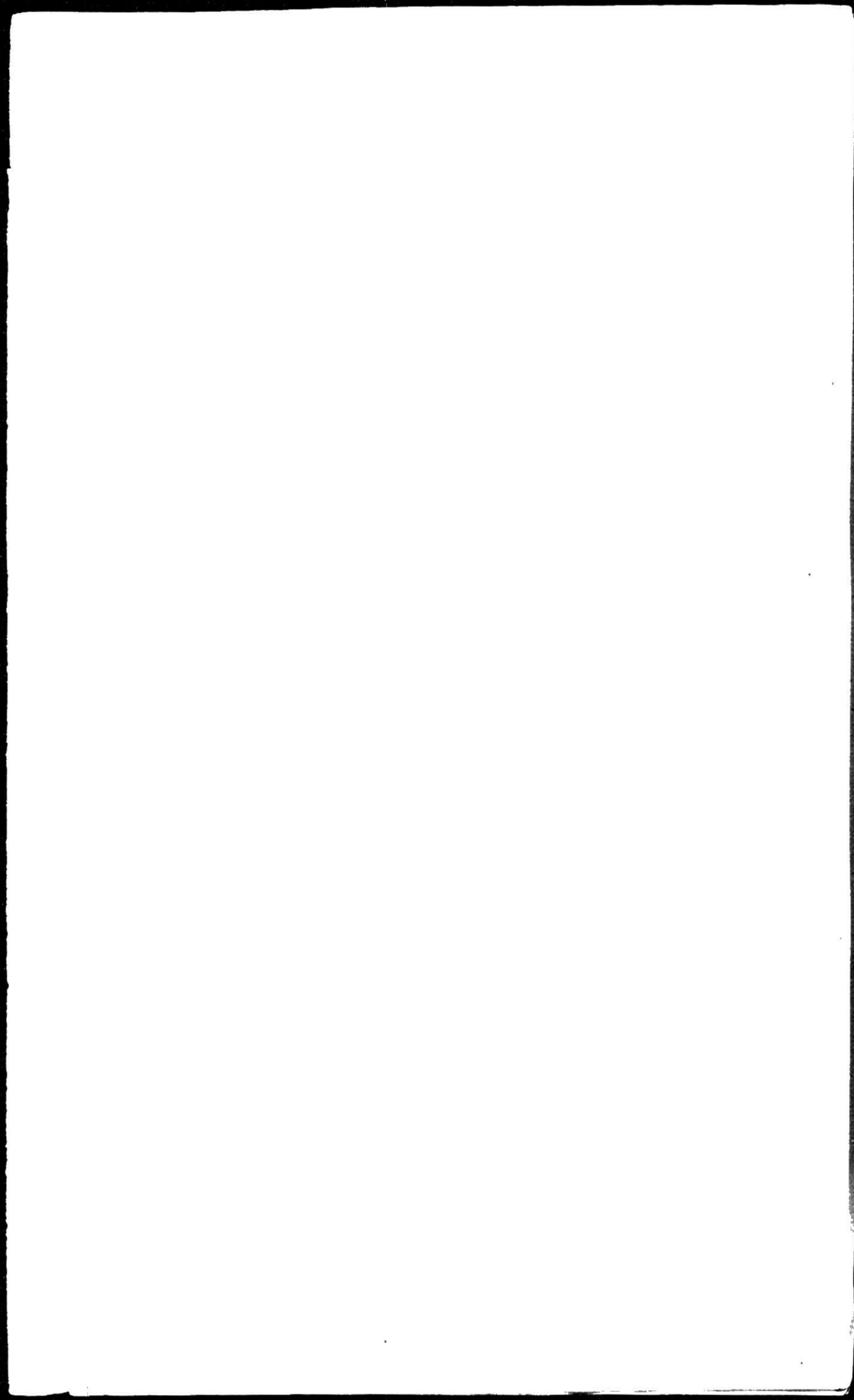
*United States Court of Appeals
For the
District of Columbia Circuit*

FILED AUG 14 1953

COBB AND WEISSBRODT
1822 Jefferson Place, N. W.
Washington 6, D. C.

By:

DAVID COBB
I. S. WEISSBRODT
A. W. WEISSBRODT
Attorneys for Appellant



No. 11,845

QUESTIONS PRESENTED

1. Was the ruling of the Civil Service Commission that Kletzing, because he is blind, is ineligible to compete for beginner positions in the competitive civil service in the fields of law, economics, editing, and trade-mark examining prohibited by the law against discrimination because of a physical handicap contained in U.S.C.A., Title 5, § 633(2) 9?

2. Did the above question become moot upon expiration of the civil service registers for which the said ruling had made Kletzing ineligible?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,845

RUSSELL REDFIELD KLETZING, *Appellant*

v.

ROBERT RAMSPECK, Chairman, United States Civil Service
Commission, et al., *Appellees*

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The complaint asserts that the Civil Service Commission in refusing plaintiff because of blindness a place on civil service registers for beginner and trainee positions in law, economics, editing, and trade-mark examining was arbitrary, discriminatory and in violation of law, and in particular in violation of the law against discrimination because of a physical handicap contained in the Act of June 10, 1948, c. 434, 62 Stat. 351, U.S.C.A. Title 5, §

633(2) 9, hereinafter referred to as U.S.C.A., Title 5, § 633(2) 9. App. 7A-8A. The jurisdiction of the United States District Court for the District of Columbia is sustained by U.S.C.A., Title 28, § 1331; Title 11 District of Columbia Code, §§ 301, 306; by the Administrative Procedure Act. U.S.C.A., Title 5, § 1009; and by the Declaratory Judgment Act. U.S.C.A., Title 28, §§ 2201 and 2202. The case is before this Court on appeal from a final order of the United States District Court for the District of Columbia, which granted the defendant's motion for summary judgment and dismissed the complaint on the ground that the cause is moot. App. 94A. U.S.C.A., Title 28, § 1291.

STATEMENT OF THE CASE

Kletzing, the plaintiff, is totally blind and has been totally blind from infancy. He is a graduate of the University of California, where he obtained the degrees of A.B. and L.L.B., and was a member of the Phi Beta Kappa honor society. He is a member of the bar of the State of California. He was employed for a short period by the United States Government as a Counseling Aide in the beginner Civil Service Classification Grade of S.P.-6. Since February, 1950, Kletzing has been employed by the United States Government as an attorney in the Bureau of Reclamation, Department of Interior, commencing that employment in a beginner's position in Civil Service Classification Grade GS-7. Each of Kletzing's positions in the employ of the United States Government has been excepted from the competitive Civil Service and Kletzing has never been given a competitive status in the classified civil service. App. 34A-8, 35A.

Early in 1949 the defendant Civil Service Commission, hereinafter called the Commission, announced an examination for beginner and trainee positions in the fields of

law, economics, editing and trade-mark examining.¹ Successful candidates in this examination, who met all other requirements of the Commission, were placed upon registers which were thereafter used by the Commission to fill all competitive civil service beginner and trainee positions in law, economics, editing and trade-mark examining, except only those filled by reinstatement, promotion, or transfer. App. 36A, 44A. These registers were established about June, 1949. App. 37A-38A. The last of these registers was expired by the Commission in October, 1952. App. 9A-10A, 92A. During the life of these registers, the only persons eligible to compete for appointment to a beginner or trainee position in law, economics, editing and trade-mark examining in the competitive civil service were the persons on these registers or persons otherwise having a competitive status in the classified civil service. App. 44A.

Kletzing took this examination in the Spring of 1949. He asked to be placed upon the economist and editor registers in the Twelfth Civil Service Region, and under date of May 26, 1949, he was notified by the Twelfth Region Office that he had passed the examination for these registers and that his name had been placed on these registers. App. 37A. He asked to be placed upon the law register in the Fourth Civil Service Region, and under date of June 24, 1949, was notified by that office that he had passed and his name had been placed on that register. App. 37A. He asked to be placed upon the editor and trade-mark examining registers in the Central

¹ The examination taken by Kletzing was for so-called "Junior Professional Assistant" positions under the options of "Legal Assistant", "Economist", "Technical Editor", and "Trade-Mark Examiner". App. 35A-37A. The parties have stipulated that "all positions for trainees and beginners in the fields of law, economics, editing, and trade-mark examining are classified by the Civil Service Commission under the general category of Junior Professional Assistant positions". App. 44 A.

Office of the Commission. The Central Office, under date of July 19, 1949, canceled Kletzing's applications for these registers because of his blindness. App. 38A, 52A. Shortly thereafter, the Twelfth and Fourth Region Office each notified Kletzing that his name had been removed from the registers in its office because of his blindness. App. 38A-39A.

Kletzing thereafter appealed these adverse decisions to the Board of Appeals and Review of the Commission and to the Commission itself. App. 39A-40A, 58A-60A, 62A-75A. The Commission never changed its ineligible rating. App. 56A, 57A, 61A-62A, 75A-77A. Accordingly, after exhausting his avenues for administrative relief, Kletzing filed his complaint in the Court below on August 23, 1950. App. 2A-9A. When the complaint was filed, the registers for which the Commission had declared Kletzing ineligible were in effect; and Kletzing sought from the Court an order restoring his name to these registers and declaring the Commission's ineligible rating to be in violation of U.S.C.A., Title 5, § 633(2) 9. The last of these registers was expired by the Commission in October, 1952, and since that time Kletzing has conceded that the Court may not now restore his name to these registers, but has persisted in his demand for a declaratory judgment, which will prevent the Commission from again ruling him ineligible for all beginner and trainee positions in law, editing, and economics.

U.S.C.A., Title 5, § 633(2) 9 provides that the Commission shall make rules so that:

“* * * no person shall be discriminated against in any case because of any physical handicap, in examination, appointment, * * * with respect to any position the duties of which, in the opinion of the Civil Service Commission, may be efficiently performed by a person with such a physical handicap. * * *”.

The Court below heard Kletzing's complaint upon a stipulated record. The parties filed cross-motions for

summary judgment and the Commission filed a motion to dismiss the complaint for mootness. App. 90A-94A. Briefs Amicus Curiae were filed by the two leading national organizations for the welfare of the blind, the American Foundation for the Blind, Inc. and the National Federation of the Blind. The latter is undertaking the cost of this appeal. The Court below granted the Commission's motion for summary judgment and dismissed the complaint on the ground that the cause is moot. No opinion issued. The order recites: " * * * it appearing that the cause is moot in that all of the Civil Service registers to which plaintiff seeks to be restored have been expired by the Civil Service Commission in accordance with its usual practice because they were no longer being utilized by the departments and agencies to fill vacancies, * * *". App. 94A.

STATUTE INVOLVED

The statute involved is the Act of January 16, 1883, c. 27, § 2, 22 Stat. 403, U.S.C.A., Title 5, § 633 establishing the duties of the United States Civil Service Commissioners, as amended by the Act of June 10, 1948, c. 434, 62 Stat. 351, U.S.C.A. Title 5, § 633(2) 9. The pertinent provisions of this law read as follows:

"It shall be the duty of said commissioners:

(1) First. To aid the President, as he may request, in preparing suitable rules for carrying this section * * * into effect * * *.

(2) Second. Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

* * *

9. Ninth, that no person shall be discriminated against in any case because of any physical handicap, in examination, appointment * * * with respect to any position the duties of which, in the opinion of

the Civil Service Commission, may be efficiently performed by a person with such a physical handicap: *and provided further*, That such employment will not be hazardous to the appointee or endanger the health or safety of his fellow employees or others."

STATEMENT OF POINTS

- I. Kletzing has shown a present controversy in which he has standing to sue and which was not made moot by the expiration of the registers on which Kletzing was refused a place.
- II. The Commission's ruling that Kletzing is ineligible because of his blindness to be placed upon registers for beginner's in law, economics, editing and trademark examining was arbitrary, was not supported by evidence, and failed to follow a procedure which would satisfy elementary standards of reasonableness essential to the due administration of U.S.C.A., Title 5, § 633(2) 9.

SUMMARY OF ARGUMENT

The last of the registers on which the Commission refused Kletzing a place expired on October 9, 1952, shortly before the Court below heard argument on the cross-motions of Kletzing and the Commission for judgment. The controversy, however, between Kletzing and the Commission was not thereby ended.

Kletzing is still blind and still a candidate for competitive appointment in the civil service. The Commission is still engaged in examining persons for competitive civil service appointment. The Commission has indicated in this proceeding a constant intent not to revise or change its ruling whereby Kletzing is excluded from examination for all beginner and trainee positions in the competitive

civil service in law, editing and economics, Kletzing's fields of professional expertness. The Court may take note that as recently as March 2, 1953, the Commission announced a new examination for beginner and trainee positions in law and economics and that, in its announcement, the Commission stated: "Good distant vision in one eye and the ability to read, without strain, printed material the size of typewritten characters is required, glasses permitted."²

The controversy between Kletzing and the Commission is as real today as it was before the registers had expired. No good purpose will be served by requiring Kletzing to apply to the Commission for examination for placement upon new registers. These new registers are closed to him by the Commission's ruling in issue in this case and by the Commission's recently published physical requirements for beginner positions in law and economics calling for "good distant vision in one eye * * *". In any event, the new registers might expire before a Court could decide the new controversy.

The controversy between Kletzing and the Commission presents a substantial question as to the meaning of U.S.C.A., Title 5, § 633(2) 9. The Commission has issued a ruling which bars Kletzing from examination. If this rule is valid, it will defeat one of the principal purposes claimed for the legislation by the organizations that sponsored it. The decision of the Court below permits the Commission to continue to apply its interpretation of the law without judicial review. Neither party to this controversy has any good reason to avoid judicial review, least of all the Commission, which is charged with the responsibility for carrying out the correct meaning of the law.

² Civil Service Commission Junior Professional Assistant Announcement No. 14-382 (1953), issued March 2, 1953.

Under the circumstances of this case, responsibility for determining the meaning of the law rests in the Court unless the controversy has become truly dead. This controversy is far from dead so long as the Commission persists in its contention that it may bar Kletzing from examinations for all beginner positions in law, economics, and editing. The crux of this controversy is the legality of this ruling. The expiration of registers did not change the ruling. Accordingly, the Court below erred in not examining the merits of the controversy and in failing to decide whether or not the Commission's ruling is prohibited by U.S.C.A., Title 5, Section 633 (2) 9.

The ruling by the Commission that Kletzing was not eligible because of his blindness for any position for beginners or trainees in the competitive civil service in law, economics, editing and trade-mark examining is based upon a determination of fact by the Commission that each and every such position will include duties which in its opinion require the use of eyesight or upon a presumption to that same effect. Any such determination, if made, was arbitrary and contrary to facts in the record of this case. Any such presumption, if made, fails to follow a procedure which would satisfy elementary standards of reasonableness necessary to prevent the discrimination proscribed by the statute.

The Commission's ruling barred Kletzing from examination for all beginner positions to be created in the competitive civil service during the life of the registers for which the examination was given. The particular duties or combinations of duties to be assigned to such positions was almost limitless. The assignment of these duties was solely the concern of the employing departments and agencies. The Commission had no authority to predetermine or revise any selection of these duties that any employing department or agency might choose to make.

In the event that an employing department or agency should choose to assign to any such position only duties *not* requiring the use of eyesight, the Commission had no authority to revise that choice. The Court may take note that, outside the competitive civil service, beginner positions in law, editing and economics have been created which do not require eyesight. The Court may take note that eyesight is not a prime prerequisite to every beginner or trainee position in law, economics, and editing.

Accordingly, if the Commission determined that reading with one's own eyes was a *necessary* requirement of *every* such position, that ruling was arbitrary in its discrimination against blind persons and was contrary to fact. If, instead, the Commission adopted a presumption that all such positions to be created in the competitive civil service will require eyesight, that presumption had the effect of barring blind persons in advance from future opportunities which might otherwise be available to them. The use of such a presumption in the formulation of the rule that has barred Kletzing from examinations for these positions meant that the Commission failed to follow a procedure which would satisfy the elementary standards of reasonableness necessary to prevent the discrimination prohibited by the law. This being so, the Commission's ruling that Kletzing, because of his blindness, was not eligible to be examined for any such beginner position was a discrimination prohibited by U.S.C.A., Title 5, § 633(2) 9.

ARGUMENT

I.

Kletzing Has Shown a Present Controversy in Which He Has Standing to Sue and Which Was Not Made Moot by the Expiration of the Registers on Which Kletzing Was Refused a Place.

(a) Case of Present controversy.

The object of this case is to obtain a declaration from the Court that the ruling of the Commission, that made Kletzing, because of his blindness, ineligible for examination for any beginner position in the competitive civil service in the fields of law, economics and editing was prohibited by U.S.C.A., Title 5, § 633(2) 9. This ruling was in no sense conjectural or hypothetical. The Commission ruled Kletzing ineligible because of his blindness. It acted upon this ruling to remove Kletzing from registers for which he had qualified in competitive examination. The Commission has maintained its right and authority, throughout this litigation, to persist in this ruling. Kletzing is still blind and still a candidate for competitive civil service appointment. These facts show a present controversy within the precedents of this Court.

In *Federal Trial Examiners Conference v. Ramspeck*, 104 F Supp 734 (D.C. D.C., 1952), (affirmed by this Court in 202 F. 2d 312, and reversed by the Supreme Court in 345 U.S. 128 on grounds not changing the decisions below with respect to jurisdiction), the Court examined the regulations of the Commission applicable to trial examiners to determine their conformance with provisions of the Administrative Procedure Act. The Commission contended that there was no present controversy because the claims of alleged injury to the trial examiners were conjectural and hypothetical. Similarly in this case the

Commission has tried to show that Kletzing has not been injured and that consequently no justiciable controversy exists. In disposing of this argument Chief Judge Laws stated the principle that is equally applicable here:

"As indicated above, the action complained of in the case at bar is not contingent on future events, but is an accomplished fact. Where regulations have been adopted and are about to be put into effect, one whose rights may be adversely affected may proceed to protect himself before suffering actual damage. The Court is of opinion that a present justiciable controversy exists in favor of plaintiffs". *Federal Trial Examiners Conference v. Ramspeck, supra*, at 739.

See also *Hilton v. Forrestal*, 165 F. 2d 251 (C.C.A. D.C.), affirmed 334 U.S. 323.

(b) *Kletzing Has Standing to Sue.*

The dominant purpose of U.S.C.A., Title 5 § 633(2) 9 was to prevent discrimination because of a physical handicap in any case of examination or appointment to the competitive civil service. Kletzing is a physically handicapped person. He is a person who, but for his physical handicap, has shown himself to be qualified for appointment to the competitive civil service. Accordingly, Kletzing is a person who stood to be benefited by this law and has standing to seek legal redress against steps which deprive him of that benefit. *Federal Trial Examiners Conference v. Ramspeck, supra*, at 738.

This Court has established the principle that a federal government employee is entitled to judicial protection of rights created in the employee by Congressional enactment. *Bailey v. Richardson*, 86 App. D.C. 248, 182 F. 2d 46, affirmed 341 U.S. 918. *Borak v. Biddle*, 78 App. D.C. 374, 141 F. 2d 278, cert. denied, 323 U.S. 738. This same principle is equally applicable to competitors for civil service positions. *United States v. Mitchell*, 89 F. 2d 805

(C.C.A. D.C.) *Deming v. United States, ex rel. Ward*, 59 App. D.C. 188, 37 F. 2d 818. *United States ex rel Rodriguez v. Bowyer*, 25 App. D.C. 121. The protection afforded by the Court to competitors for civil service positions will not be made contingent upon the competitor remaining unemployed, or remaining employed at a salary less attractive than would be afforded him in the civil service. *Papaliolios v. Durning*, 90 F. Supp. 496 (U.S. D.C. S.D. N.Y., 1950), affirmed 186 F. 2d 308, cert. denied, 341 U.S. 940.

(c) *Kletzing's Cause of Action Was Not Made Moot by the Expiration of the Registers.*

Professor Borchard in his treatise on Declaratory Judgments concludes his discussion of the topic of mootness by stating that if an action for a declaratory judgment raises issues which are "fictitious, colorable, hypothetical, abstract, academic, or dead" the action must be dismissed. It will not be seriously contended that the "case or controversy" presented here is "fictitious, colorable, hypothetical or abstract". The Commission does contend that the issue has become academic or dead by reason of the expiration of the registers on which Kletzing had been refused a place.

This contention rests upon a distortion of the object of this complaint. The complaint charged that the Commission violated the law by ruling Kletzing ineligible to be examined for beginner and trainee positions in law, editing and economics in the competitive civil service. Kletzing's prayer for relief recited that he sought restoration to the registers from which he had been removed by reason of this ruling, a declaration that the ruling was in violation of law, and such other relief as the Court might deem proper. The Commission has tried to make it appear that the sole object of this litigation was to restore Kletzing to the registers for which he had been

examined. The truth is that restoration to these registers would have been only a temporary remedy. The more important remedy sought by Kletzing is a declaration that the Commission's action disqualifying him because of his blindness was unlawful and accordingly may not be repeated.

The Commission has also distorted the significance of the expiration of these registers. The Commission has implied that there is no present prospect that new registers for these positions will be established, or that, if new registers are established, the Commission will again rule Kletzing ineligible because of his blindness. The Court will surely take judicial note that the responsibility of the Commission to examine persons for beginner positions in law, economics, and editing has not changed by reason of the expiration of these registers. The Court may take note that since the expiration of the Kletzing registers, the Commission has announced new examinations for the establishment of new registers to cover these same kinds of positions.³ The Court may take note

³ The following is an incomplete list of examination announcements for beginner positions in professional fields issued by the Commission in 1953. Each announcement states that "good distant vision in one eye * * *" is required to take the examination.

Junior Professional Assistant.

No. 8-22 (1953) issued February 6, 1953, covered legal assistant.

Junior Professional Assistant.

No. 13-12 (1953) issued February 9, 1953, covered economist and legal assistant.

Junior Professional Assistant.

No. 14-382 (1953) issued March 2, 1953, covered economist and legal assistant.

Junior Professional Assistant.

No. 2-30 (1953) issued March 25, 1953, covered "social science analysts" who will interview and advise claimants in the administration of the Social Security Act.

Junior Government Assistant.

No. 14-469 (1953) issued May 4, 1953—Purpose to recruit out-

that in these new announcements the Commission has included the precise ruling which Kletzing has charged is in violation of law and that these announcements are, therefore, conclusive that the Commission is persisting in its holding that Kletzing, because he is blind, is not eligible to be examined for the beginner and trainee positions in issue in this case.

It is unusual for a Government agency, charged with responsibility for the administration of a law and proposing to administer that law in a manner in dispute, to seek to avoid a Court determination of the law's meaning. Ordinarily, the Government agency will seek judicial confirmation of its construction of the law. Under such circumstances, the law is now firmly established that a controversy will not be made moot by the cessation of a particular practice charged to be illegal if there is no restraint to prevent its resumption. The United States Supreme Court made this point the subject of discussion in granting certiorari in *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944). The Court in that case stated:

"Petitioner here filed a complaint in the District Court seeking, in part, an injunction to compel respondent to cease its use of the split-day contracts. Two months after the complaint was filed, but before the case came on for trial, respondent discontinued the use of these contracts and substituted different compensation plans not now before us. * * * In granting certiorari upon the question of the legality

standing young people for careers leading to high level positions. Only basic requirement is completion of full four year course in an accredited college.

One *Junior Professional Assistant* examination, which covered economist and legal assistant, and was announced by the Commission in 1953, contained only a general statement of physical requirements similar to the statement included in the announcement of the Junior Professional Assistant examination taken by Kletzing. App. 45A. Junior Professional Assistant Announcement No. 7-4 (1953) issued February 27, 1953.

of the split-day plan we asked for a discussion of the question whether respondent's discontinuance of the plan rendered the case moot. 321 U.S. 759, 88 L. ed. 696, 64 S. Ct. 788. We hold that the case is not moot under these circumstances. Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. * * * Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus "an actual controversy, and adverse interest," *Lord v. Veazie*, 8 How. U. S.) 251, 255, 12 L. ed. 1067, 1069, with a subject matter on which the judgment of the court can operate", *Ex. parte Baez*, 177 U.S. 373, 390, 44 L. ed. 813, 817, 20 S. Ct. 673; *St. Pierre v. United States*, 319 U.S. 41, 42, 87 L. ed. 1199, 1200, 63 S. St. 910."

The rule is, of course, particularly applicable where the disputed action is not only capable of being repeated but may be expected to be repeated. *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332 (1924); *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C.C.A. 8, 1944); *Walling v. Haile Gold Mines*, 136 F. 2d 102 (C.C.A. 4, 1943). Also this rule is particularly applicable where a determination of the meaning of the law will serve as a guide to the public agency which will be called upon to act again in the same matter. *Gay Union Corp. v. Wallace*, 71 App. D.C. 382, 112 F. 2d 192, cert. denied 310 U.S. 647.

We submit that there is no reason to apply the above rule of law only in cases where the charge of illegal conduct is brought by a government agency against a private party. Presumably the rule has been established in these cases because it is rare that the government agency charged with administering a law seeks stratagems for avoiding judicial review. Indeed this Court may well

wonder why the Commission has raised the defense of mootness in Kletzing's case when it is fully apparent that the Commission has every intention to continue to rule Kletzing ineligible for the positions here in issue. We conclude that the Court will find that this controversy has not been made moot by the Commission's action expiring its registers.

II.

The Commission's Ruling That Kletzing is Ineligible Because of His Blindness to be Placed Upon Registers for Beginners in Law, Economics, Editing and Trade-Mark Examining Was Arbitrary, Was Not Supported by the Evidence, and Failed to Follow a Procedure Which Would Satisfy Elementary Standards of Reasonableness Essential to Due Administration of U.S. C.A., Title 5, § 633(2) 9.

(a) *Introduction.*

This controversy arises out of the clash of two different concepts of employment of blind persons. The Commission is holding to the "sheltered work shop" concept. Kletzing is a product of "rehabilitation".

The education and training of the blind to work among and with the sighted is a development of the past fifty years. Formerly blind persons were trained only to perform manual repetitive functions in sheltered environments. They made baskets, brooms and other similar objects. These sheltered work shops still exist and still account for a substantial segment of the total employment of blind persons.

Pioneers and leaders in the development of the education and training of the blind have sought to free the blind from the social isolation and economic dependence of the sheltered work shop. By the use of braille, the typewriter and the dictaphone, by the training of the

other senses, and by the development of techniques of memory and movement, blind persons have been promised, and have achieved, the ability to work in professional and other skilled occupations along with the sighted and to contribute the same full measure to their task as the sighted are able to contribute. This is the goal of modern day advocates of vocational rehabilitation for the blind.

The present vocational rehabilitation program supported by the State and Federal governments is eloquent testimony to the rapidly expanding opportunities for training and educating blind persons. The 1950 Annual Report of the Federal Security Agency shows a 43 percent increase in the number of visually handicapped persons "rehabilitated" over the preceding five years (4,945 in 1945, 7061 in 1949). It shows that since 1949, 11 to 13 percent of the blind persons being trained by these federal-state programs are receiving their training in sighted colleges, business schools, and equivalent institutions. These statistics establish that annually these "rehabilitated" blind persons are graduating from our colleges and professional schools, matching themselves in competition with their sighted fellow students, and, in some cases equalling the best performances of the sighted students.

Kletzing is a member of this group of blind, professionally trained persons. In this action, he represents, in effect, all the members of this group who are seeking the same opportunities to compete with the sighted in the practice of their profession that they have been granted in the learning of their profession. The sheltered work shop concept of employment for the blind, to which the Commission still clings, often stands in their way. The Commission, as recently as 1946, reported that in the federal government "small groups of positions in sheltered environment, involving repetitive work, were * * * found to have placement potentialities for the blind". This sheltered work-shop concept is still causing the

Commission to exclude blind persons from virtually every professional position. With the single exception of Social Worker registers, the Commission has not to date admitted blind persons upon any civil service register of positions calling for a college education, or its equivalent. It is this conflict in outlook toward employment of blind persons which is at the root of the controversy in this case.

- (b) *The Commission's Discretion in Administering U.S.C.A. Title 5, § 633(2) 9 Does Not Extend to Making a Ruling Which Is Arbitrary, or Is Not Supported by the Evidence, or Fails Procedurally to Satisfy Elementary Standards of Reasonableness Essential to Achieve the Non-Discrimination Prescribed by the Act.*

U.S.C.A., Title 5, § 633(2) 9 provides that "no person shall be discriminated against in any case because of any physical handicap * * * with respect to any position which, *in the opinion of the Civil Service Commission, may be efficiently performed by a person with such a physical handicap * * *.*" (Italics added).

Undoubtedly this statute confides in the Commission broad discretion. On the other hand, the Congress plainly intended by this legislation to prevent discrimination against physically handicapped persons and did not propose that this protection offered to the physically handicapped should be allowed or disallowed in the discretion of the Commission. The statute authorizes the Commission to determine a question of fact, not to grant or deny in its own discretion the benefit of non-discrimination prescribed by law. See *Supervisors Rock Island County v. United States*, 71 U.S. (Wall.) 437 (1867).

Congress has made this intent abundantly clear. The law states that there shall be no discrimination because of a physical handicap in examination for any position which, in the opinion of the Commission, "may be efficiently performed by a person with such a physical handicap". Congress authorized the Commission to determine this question of fact. Congress did not delegate to the Commission authority to decide to enforce or to disregard the Congressional rule against discrimination. The House Committee reporting this legislation stated:

"In recommending this proposed legislation the committee wishes to encourage the departments and agencies of the Government to employ physically handicapped persons *wherever possible* * * *. Under the proposed legislation the Civil Service Commission will be given the authority *and responsibility* for seeing to it that physically handicapped persons are not rejected for Government positions *merely because they do not meet the minimum physical standards, if such employees can perform the duties of positions for which they are being considered.*" Italics added. House Report No. 109, 80th Congress, 1st Session, Series No. 1122.

The Commission is authorized to determine whether a person with a particular handicap can efficiently perform the duties of a particular position. Its decision must be accepted unless it is shown to be arbitrary or capricious, unsupported by the evidence, or it is shown that the procedure whereby this decision was made fails to satisfy elementary standards of fairness and reasonableness essential to the achievement of the nondiscrimination prescribed by the law. *Dismuke v. United States*, 297 U.S. 167, 172, (1936). This is a basic principle of our constitutional law necessary to protect the integrity of legislation. See *United States ex rel. Knauff v. McGrath*, 181 F. 2d 839, at 842 (C.C.A. 2d, 1950).

Accordingly, the Commission has violated U.S.C.A. Title 5, § 633(2) 9 if its ruling whereby it made Kletzing ineligible to be examined for beginner positions in law, economics and editing was arbitrary, or was not supported by the evidence, or was arrived at by a procedure that failed to satisfy elementary standards of reasonableness essential to the nondiscrimination prescribed in the Act.

- (c) *The Commission's Determination That Kletzing Was Ineligible to Be Examined for Any Beginner Position in Law, Economics, Editing or Trade-Mark Examining Was Arbitrary, Was Not Supported by the Evidence, and Was Arrived at by a Procedure That Failed to Satisfy Elementary Standards of Reasonableness Essential to Achieve the Nondiscrimination prescribed by the Law.*

Kletzing's grievances against the ruling of the Commission may be summarized as follows:

(1) The ruling barred him from a wide variety of beginner and trainee positions before the positions were created and their duties defined and when the Commission could not know the particular duties that would be assigned to each position by the employing departments and agencies.

(2) If, to make its ruling, the Commission determined that every one of these positions, when created *must of necessity* contain duties requiring the use of eyesight, the Commission's determination is contrary to fact and discriminatory against the blind, and hence is both unsupported by the evidence and arbitrary.

(3) If, to make its ruling, the Commission determined that these positions, when created, will *normally* contain duties requiring the use of eyesight, and, on this basis, the Commission *presumed* that every such position *will* contain such duties, the Commission adopted a procedure

in the making of its ruling that failed to satisfy elementary standards of reasonableness essential to prohibit discrimination "in any case" as prescribed by the law.

(4) The Commission, by its own admissions, did fall into one, or the other, or both of these errors.

The record shows that the registers on which the Commission refused Kletzing a place covered beginner and trainee positions in the fields of law, economics, editing and trade-mark examining. It shows that, during the life of these registers, no person without competitive civil service status could be appointed to any of these kinds of positions unless he had a place on these registers. It shows that, over the life of these registers, the duties that might be assigned to any one of these positions would be selected by the employing departments and agencies, not by the Commission; and that the selection of such duties was not subject to predetermination or revision by the Commission. Kletzing submits that the Commission has by stipulation agreed that the ruling that barred him from examination for these positions was a ruling barring him from examination for a wide variety of beginner and trainee positions as to which the Commission could not and did not know the exact assignment of duties.

The record is replete with evidence that duties requiring the use of eyesight are not a prime prerequisite of, and are not necessarily found in, every beginner or trainee position in law, economics and editing, either in the government service or outside.* Kletzing himself has held a beginner position in law in the government

*For decisions of New York state courts adopting a test of primary functions of civil service jobs see: *People ex rel. Moriarity v. Creelman*, 206 N.Y. 570; *Lord v. Ordway*, 1916, 219 N.Y. 451, 114 N.E. 800; *Vitale v. Conway*, 98 N.Y.S. 2d 195, 198 Misc. 770.

service. App. 34 A-35 A. The record contains the story of Louis Rives, another blind lawyer, who has held a similar position in government service. App. 24 A-34 A. The record contains the testimony of an expert in the placement of blind persons, who states that eyesight is not a prime prerequisite for such positions. App. 34A thru 34A-8. In addition the Court may take judicial notice that blind persons have succeeded in these professions and that the federal government is itself expending annually large sums of money for the education and training of blind persons—veterans and others, in our sighted colleges and law schools and that blind graduates of these training programs are able to succeed in their professions. On the other hand, the record contains no finding by the Commission that duties requiring eyesight *must of necessity* be assigned to every one of these beginner positions. Instead, the Commission has stated that *normally* duties requiring eyesight are performed in these positions. App. 75 A-77 A. The Executive Assistant of the Commission has submitted to the Court an affidavit which, in effect, concedes that positions not including duties requiring eyesight may be created in the future. App. 93 A.

If the Commission's ruling, therefore, was based upon a determination that every beginner and trainee position in these fields in competitive civil service *must of necessity* contain duties which, in the opinion of the Commission, require eyesight, it is a ruling not supported by the evidence, discriminatory against the blind, and arbitrary. See App. 55 A-56 A, 57 A, 61 A-62 A, 77 A-84 A.

On the other hand, the statute explicitly prohibits discrimination "in any case." See *Work v. United States, ex rel. Mosier et al.*, 261 U.S. 352, 360 (1922). If the Commission's ruling, therefore, is based upon a *presumption*, it is based upon a process of determination which fails to observe elementary standards of reasonableness

necessary to protect against the discrimination *in any case* outlawed by the statute. The presumption that all positions that will be filled by these examinations will require eyesight is a fallible presumption so long as there is no compulsion or necessity that all these positions must include duties that require eyesight. The presumption may reflect accurately what is *normal* and what has been done in the past. It does not reflect what *may be done* in the future during the life of the registers for which the examinations are given. If, therefore, the Commission based its ruling that made Kletzing ineligible for examination upon this presumption, the ruling has discriminated against Kletzing by removing him from registers which may be used in some case to fill a position that Kletzing could have performed efficiently.

The seriousness of the use of this presumption to exclude blind persons from these registers is illustrated by the Commission's admission that no position suited to a blind person has yet been found in the competitive civil service. By using this presumption to exclude blind persons from places upon these registers, the Commission almost forecloses the possibility that a position suited to the blind will be created. Until the blind candidate is eligible to compete for a particular position in these fields of work, the possibility that an employing agency will shape the duties of a position to suit a blind candidate are remote. On the other hand, allow the blind person to compete; and positions will be created suited to reap the benefits of the blind person's skill and training. Accordingly, by the use of this presumption, the Commission has failed to satisfy the elementary standards of reasonableness and fairness essential to the due conduct of the prohibition against discrimination contained in U.S.C.A. § 633(2) 9. See *Cassell v. State of Texas*, 339 U.S. 282, 70 S. Ct. 629, 94 L. ed. 839 (1950); *Hill v. State of Texas*, 366 U.S. 400, 62 S. Ct. 1159, 86 L. ed. 1559.

Kletzing, therefore, respectfully submits that this Court should remand this case with directions to the District Court to issue an appropriate order that will declare that the Commission's action ruling Kletzing ineligible for examination for beginner positions in law, economics, editing, and trade-mark examinations, in advance of the formulation of the precise duties to be performed in each such position, was a ruling in violation of U.S.C.A., Title 5 § 633(2) 9.

Respectfully submitted,

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APPELLEE'S BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RUSSELL REDFIELD KLETZING, APPELLANT

v.

ROBERT RAMSPECK, CHAIRMAN, UNITED STATES CIVIL SERVICE
COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

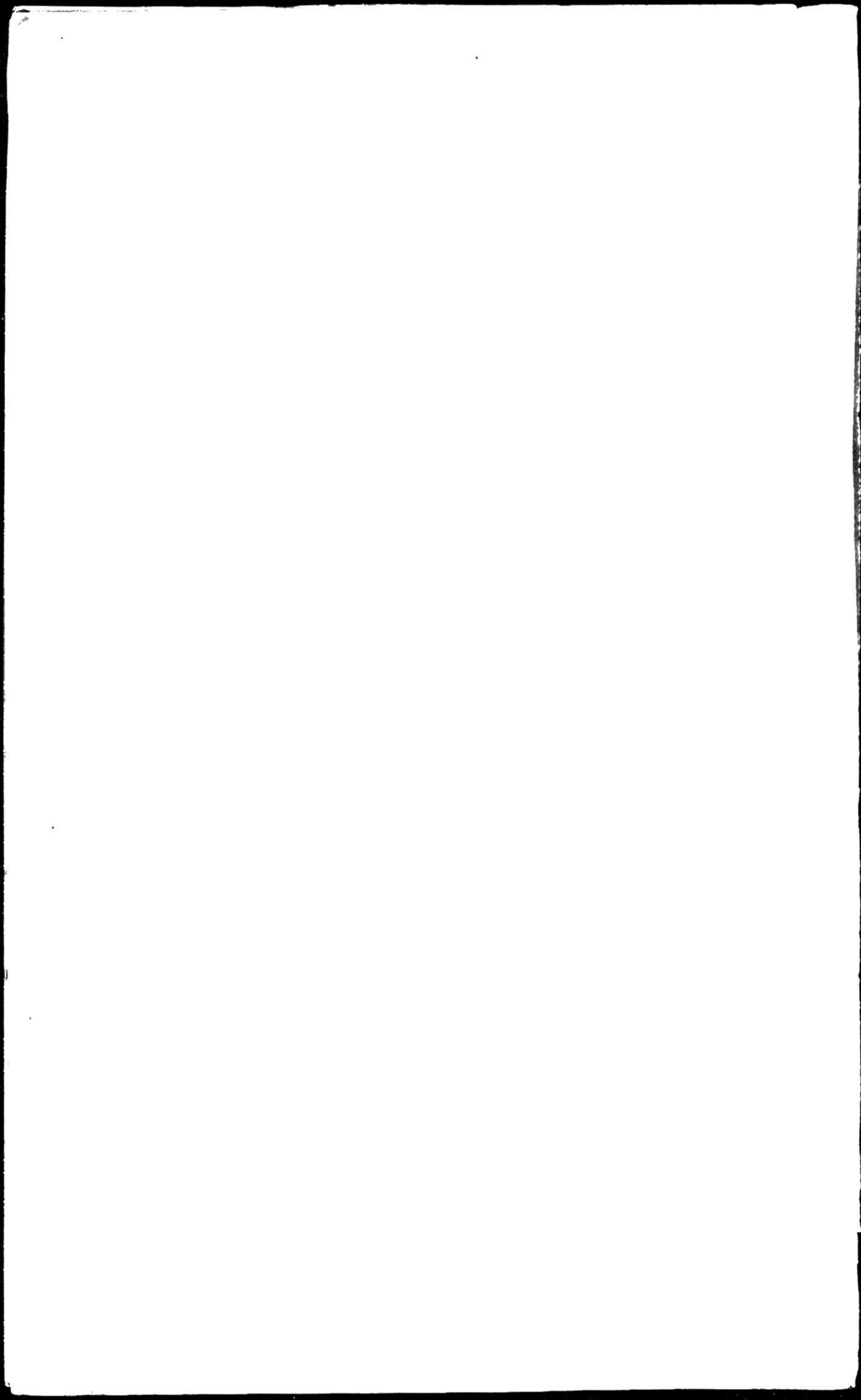
*United States Court of Appeals
For the
District of Columbia Circuit*

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QUESTIONS PRESENTED

1. Whether the court below was correct in holding that this action is moot because the registers to which appellant seeks reinstatement have expired.

2. Whether this action presents any case or controversy within the scope of the judicial power.

3. Whether the Civil Service Commission's determination that blind persons cannot efficiently perform the duties of the positions for which appellant was examined was an exercise of discretion vested in the Commission by law, not subject to the judicial reversal.

4. Whether the Civil Service Commission's decision to remove appellant from the registers discriminated against him or against blind persons in contravention of 5 U.S.C. 633(9).

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,845

RUSSELL REDFIELD KLETZING, APPELLANT

v.

ROBERT RAMSPECK, CHAIRMAN, UNITED STATES CIVIL SERVICE
COMMISSION, ET AL., APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF CASE

This counterstatement is deemed necessary, because the statement of the case in appellant's brief omits certain material facts.

Russell Kletzing, plaintiff-appellant in the case, holds undergraduate and law degrees from the University of California; is a member of the California state bar and is employed by the Bureau of Reclamation, Department of the Interior, as an attorney at Grade GS-9. This position is not in the competitive civil service, being an attorney position in the executive branch of the Government (J.A. 35A).

On November 23, 1948, the Civil Service Commission issued Announcement No. 137 providing for competitive ex-

aminations to be given for Junior Professional Assistant positions, or "options." The announcement contained a description of work to be done in each position, and included a provision that applicants must be physically capable of performing the duties of the position, and that a physical examination would be made by a Federal Medical Officer before appointment (J.A. 45A). The Medical Division of the Civil Service Commission prescribed, in accordance with its responsibility for prescribing physical standards for civil service positions, that Junior Professional Assistants must have good distant vision in one eye and ability to read printed material without strain (J.A. 79A-84A). Appellant took the examinations for the positions of Legal Assistant—Fourth Region; Trade Mark Examiner—Central Office; Economist—Twelfth Region; and Technical Editor (Physical Science)—Central Office and Twelfth Region. In taking the examinations, Kletzing was assisted by having another person read the questions to him and write his answers in the appropriate spaces (J.A. 37A). In May 1949, he was informed that he had passed the examination for Technical Editor (with a rating of 77.5) and for Economist (with a rating of 72.5); and in June 1949, he was informed that he had passed the examination for Legal Assistant (with a rating of 75.5). His name was placed on the appropriate registers (J.A. 37A).

On July 19, 1949, the Civil Service Commission, after reviewing his application, notified Kletzing that because the duties of Technical Editor and Trade Mark Examiner were such that they could not be performed by a blind individual without assistance, his eligibility had to be cancelled for physical disability. Similar action was taken for the other positions for which Kletzing had applied upon the stated basis that they also required vision (J.A. 38A, 52A).

On August 1, 1949, Kletzing asked that this decision be reconsidered in the light of his proposal to employ a reader at his own expense. On August 17, 1949, the Commission affirmed its decision that Kletzing could not qualify for

these positions because he would be depending on assistance of another and therefore not be performing the required work himself (J.A. 56A). On October 17, 1949, Kletzing again requested reconsideration of the decision and on December 22, 1949, the Board of Appeals and Review affirmed the finding of ineligibility (J.A. 61A). From this decision Kletzing, on February 24, 1950, appealed to the whole Civil Service Commission and on March 31, 1950 the Commission decided that it could not find that Kletzing could perform the duties of the positions for which he had applied. It wrote Kletzing:

"We have given the most careful consideration to your letter of February 24, 1950, in which you state your reasons for believing that your name should be restored to the registers from which it was removed and that you be permitted to work for the government, the idea being that you would, out of your own funds, engage a reader.

It is obvious, of course, that you could not yourself perform all of the duties of the position for which you desire to be considered. The very fact that you would have to engage a reader means that there is at least one function of the positions, reading, that you could not perform yourself.

* * * * *

"The Commission has been exerting every effort to encourage government departments to employ the physically handicapped when it is shown that the person can perform the duties of the position. Unfortunately, the circumstances in your case are such that the Commission cannot say that you would be able to perform the duties of the positions for which you have applied." (J.A. 75A, 76A).

In 1950 and 1951 officials of the Office of Vocational Rehabilitation, Federal Security Agency, wrote to the Commission concerning Kletzing's appeal, and the Commission's replies to these inquiries disclosed that, although the Commission was making every effort to assist disabled persons

seeking Government employment, it could not disregard the standards of vision established as essential physical requirements for such jobs by certifying Kletzing's eligibility for them (J.A. 86A-89A).

All of the registers from which plaintiff was removed have now been revoked. Plaintiff would not have been appointed from any of these registers during their existence. The Twelfth Region registers for Economist expired on March 10, 1950, and the only person appointed from that register had a rating of 77 compared to Kletzing's 72.5. The Central Office and Twelfth Region registers for Technical Editor (Physical Science) expired in March 1950, and no one was ever appointed from those registers. The Fourth Region Register for Legal Assistant expired on October 1, 1952, and the only GS-5 position filled from that register went to a person with a higher rating than Kletzing. The Central Office register for Trade Mark Examiner expired October 9, 1952, and none of the people appointed from that register had ratings of lower than 90, compared to Kletzing's 75.5 (J.A. 9A-12A).

In connection with its program for the placement of physically impaired persons, the Civil Service Commission conducted in 1949, a survey of employment of the blind by the United States Government. Two agencies reported an attorney position the duties of which could be performed by a blind person; however, neither position was or could be filled from a civil service register. No agency reported an economist position the duties of which could be performed by a blind person. Since 1946, the Commission has conducted competitive examinations for 43 positions the duties of which could be performed by a blind person, but none of these required training in law or economics (J.A. 13A-14A).

On August 23, 1950, Kletzing brought this action against the Civil Service Commission and the individual Commissioners for reinstatement of his name on the registers from which he had been removed, and for a declaratory judgment

of a right to be considered, on the basis of his ability efficiently to perform the duties of the position, for every individual vacancy for which his rank on those registers shall make him eligible for consideration (J.A. 2A-9A). Both parties filed motions for summary judgment, and the Commission filed a motion to dismiss the complaint for mootness and for lack of justiciable case or controversy (J.A. 90A-94A). The court below granted the Commission's motion for summary judgment and dismissed the complaint on the ground that the case is moot, in that all of the Civil Service registers to which Kletzing seeks to be restored have been expired by the Civil Service Commission in accordance with its usual practice because they were no longer being utilized by the departments and agencies to fill vacancies (J.A. 94A).

STATUTE INVOLVED

The statute involved is the Act of January 16, 1883, c. 27, sec. 2, 22 Stat. 403, 5 U.S.C. 633, establishing the duties of the United States Civil Service Commissioners, as amended by the Act of June 10, 1948, c. 434, 62 Stat. 351, 5 U.S.C. 633(2)9. The law provides that it shall be the duty of the commissioners to prepare suitable rules which shall provide and declare, as nearly as the conditions of good administration warrant:

"9. Ninth, that no person shall be discriminated against in any case because of any physical handicap, in examination, appointment * * * with respect to any position the duties of which, *in the opinion of the Civil Service Commission*, may be efficiently performed by a person with such a physical handicap * * *." [Italics supplied.]

SUMMARY OF ARGUMENT

The court below was correct in granting the Civil Service Commission's motion for summary judgment on the ground that the expiration in due course of all of the registers from which Kletzing had been removed had rendered this case moot. There is no basis in fact for Kletzing's argument that his "ineligible status" has continued, because the Com-

mission's action was limited to his eligibility to only those specific registers for which he had been examined. So Kletzing cannot obtain a declaratory judgment of his rights in this case because his rights, if any, terminated at the expiration of the registers, and Courts will not undertake to adjudge hypothetical and non-existent rights in a case which has become moot.

Kletzing, therefore, presents no "case or controversy" within the scope of the judicial power vested in the courts by the Federal Constitution. He shows no pecuniary damage, because the highest salary he could receive had he been appointed to a position from one of the registers would have been considerably lower than his salary as a non-civil service GS-9 in the Bureau of Reclamation. A declaratory judgment should not issue in a case where there is no direct pecuniary injury or loss of other tangible benefits. Kletzing could have gained no tangible benefit from reinstatement on these registers, because the record shows without contradiction that his examination ratings were too low to give him any reasonable chance or expectation of appointment from any of these registers during their existence. Kletzing can gain no support for his case by relying on the announcement of examination for new registers, because he has not applied for any new examinations or alleged an intention to do so.

The statute expressly gives the Civil Service Commission a discretionary power to determine whether the duties of a position to be filled may be efficiently performed by persons with physical handicaps such as blindness. The record shows that the Commission gave extensive, sympathetic and careful consideration to Kletzing's various appeals from its ruling, and that Kletzing had every procedural opportunity to argue that he could efficiently perform the duties involved. The Commission's decision that Kletzing could not himself perform the duties of positions requiring sight is clearly the type of discretionary "opinion" decision for which courts should not substitute another

opinion for that of the body of experts. It is not the policy of Congress or of the courts that the fixing of physical standards for employees of the Executive branch of the Government should be reviewed by the judiciary.

If this court reaches the merits of this case, it is apparent that the Commission's action was in full compliance with 5 U.S.C. 633(9). Only a decision so arbitrary and capricious as to have no rational basis, should be upset by the courts. The record shows a rational basis for the decision here. Kletzing's deponents stated that sight was necessary for these positions. Kletzing himself, in proposing to hire a reader, admits that he cannot efficiently perform the duties of the positions involved here. The Commission cannot create jobs or establish duties therefor; its function is to certify qualified applicants to the departments and agencies who create the jobs and establish the duties. In case future positions of this kind not requiring sight are established, the Commission will admit blind persons otherwise qualified to the registers. Nor can the Commission's decision in any way prevent the departments and agencies from creating such new positions. The Commission did not act in an arbitrary or capricious manner, nor did it discriminate against Kletzing or the blind in contravention of 5 U.S.C. 633(9).

ARGUMENT

I

This Action Is Moot Because the Registers To Which Kletzing Seeks Reinstatement Have Expired

Kletzing seeks reinstatement on the five civil service registers from which he was removed by the Civil Service Commission. However, since the filing of the complaint, all of the registers involved here have expired and are no longer in existence. It would be idle and pointless to restore Kletzing to registers from which no appointments can now be made.

That a Court should dismiss an action which has become

moot is beyond challenge. *McGrath v. National Association of Manufacturers*, 344 U.S. 804 (1953); *Snyder v. Buck*, 340 U.S. 15 (1950); *Amalgamated Association etc. v. Wisconsin Employment Relations Board*, 340 U.S. 416 (1950). To adjudicate a cause which no longer exists is a proceeding which courts have uniformly declined to entertain. *Heitmuller v. Stokes*, 256 U.S. 359 (1921); *Commercial Cable Co. v. Burleson*, 250 U.S. 360 (1919); *Berry v. Davis*, 242 U.S. 468 (1917) because their judgments would be wholly ineffectual for want of a subject matter on which to operate, *Brownlow v. Schwartz*, 261 U.S. 216 (1923); *Bucks Stove & Range Co. v. Am. Fed. of Labor*, 219 U.S. 581 (1911); *Mills v. Green*, 159 U.S. 651 (1895). The court's lack of power to adjudicate a moot case cannot be enlarged by agreement of the parties, *United States v. Alaska Steamship Company*, 253 U.S. 113 (1920) or by custom, *Amalgamated Association etc. v. Wisconsin Employment Relations Board*, *supra*.

That the case at bar is moot cannot be questioned on its facts. Kletzing concedes that all five registers have expired. His argument that his "ineligible status" will continue indefinitely has no basis in fact. The Commission merely ruled that he was ineligible for appointment to certain positions for which he sought to be examined, and such ineligibility expired when the positions were filled or were no longer required.

Kletzing's contention that he is, or would be, ineligible for all new positions of this type which might in the future become available is mere conjecture. Neither Kletzing nor the Commission can determine if and when new positions may become available, or whether the Commission will be required to announce new examinations; or whether the physical requirement will or will not eliminate the necessity for vision in the proper performance of the duties of such positions. This claim to a Civil Service rating of a "prospective nature, which may never be available or realized" presents no cause or controversy upon which this court can act, *United States ex rel. Edmunds v. Root*, 22

App. D. C. 419, 431-2, because the position or register is no longer in existence, *United States ex rel. Brown v. Root*, 18 App. D. C. 239. Clearly Kletzing has not sustained his burden of proof that the lower court was wrong in finding that this case was moot by showing a "cognizable danger of recurrent violation." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

Nor can Kletzing obtain a declaratory judgment of rights which no longer exist. In *Doremus v. Board of Education*, 342 U.S. 429 (1952), plaintiffs were seeking a declaratory judgment that a New Jersey statute providing for reading of certain Old Testament passages in the public schools was a violation of the First Amendment. The court held the case moot in so far as it related to the rights of a child who had graduated from the public schools before the appeal was taken to the Supreme Court. Mr. Justice Jackson said, at page 432, that "obviously no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after events have put them to rest."

This is precisely what is overlooked in Kletzing's brief, wherein it is argued that Kletzing is entitled to a declaration that the Commission may not disqualify him because of his blindness. He now seeks to gloss over the fact that his case is moot by alleging that the Commission has implied an intention to declare Kletzing ineligible for a position on new registers which may be established for positions similar to those for which he applied. Such a contention is neither true nor relevant to the case at bar. Kletzing's cause of action, if any, arose from the decision of the Commission to disqualify him from eligibility for *certain enumerated positions* for which he had applied (J.A. 52A). It was limited to such positions and did not purport to determine Kletzing's rights to any other positions. Neither complaint nor subsequent pleadings alleged a broader right. Therefore whatever right Kletzing may have had prior to the expiration of the registers (and we shall show in Part

III that he had none) expired with the termination of the registers.

Kletzing's case is not advanced by the fact that the Civil Service Commission has issued announcements for new examinations subsequent to the decision below, because he has not applied nor indicated an intention to apply for such examinations. It is a well-established maxim that equity aids the vigilant, not those who slumber on their rights. Pomeroy, *Equity Jurisprudence*, Sec. 418 et seq. This court should not resuscitate Kletzing's action before he decides whether to avail himself of any of the rights that might be established thereby.

Kletzing's reliance on *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 and the other cases on page 15 of his brief is misplaced because in those cases there was no doubt that the resumption of the practice alleged to be illegal would renew the very same controversy already before the court. In the *Walling* case, for instance, the court granted an injunction only because had it not done so and had defendant subsequently resumed the practice in question, plaintiff would have brought another action. Furthermore, those cases all deal with clearly illegal practices discontinued by defendants apparently to avoid injunction. Such cases are clearly distinguishable from the present situation, where the Commission has already resumed a legal act in the normal course of business and it is not at all clear whether Kletzing will ever apply for a future examination.

We submit that the dismissal of this case as moot by the court below was correct and should be affirmed.

II

This Action Presents No Real Case Or Controversy

Kletzing has shown no injury or denial of tangible benefits resulting from his allegations. Therefore, even if the registers had not expired, he presents no case or controversy upon which relief may be granted by this Court.

It is well settled that the Federal Constitution limits the

exercise of judicial power to "cases" or "controversies" admitting of specific relief through a decree of conclusive character. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937). Intervening facts frequently render ineffectual the granting of relief previously within the power of a court. *United States v. International Union, etc.*, 190 F. (2d) 865, 873 (D.C. Civ. 1951).

Kletzing is employed by the Government in a non-civil service job at a Grade GS-9, for which the minimum salary is now \$5,060. But the only positions to which he could have been certified from the registers from which he was removed were at Grade GS-5, for which the minimum salary is only \$3,410 (J.A. 11A). Certainly Kletzing cannot show the "dollars-and-cents injury" which forms the basis of a case or controversy. *Doremus v. Board of Education*, 342 U.S. 429, 434-5 (1952).

The fact that plaintiff asks for a declaratory judgment does not eliminate the required showing of a direct pecuniary injury in order to establish a case or controversy. The requirements for a justiciable case or controversy are "no less strict in a declaratory judgment proceeding than in any other type of suit." *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 461 (1945) and cases cited. There, as in other cases, the question is whether "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). See also *Coffman v. Breeze Corporations, Inc.*, 323 U. S. 316, 324 (1945); *Great Lakes Dredge & Dock Co. v. Hoffman*, 319 U. S. 293, 299-302 (1943). Since, as we show below, this is not an appropriate case for a mandatory injunction, it is equally inappropriate for a declaratory judgment. *Doehler Metal Furniture Co. v. Warren*, 76 App. D. C. 60, 129 F. (2d) 43, 45 (1942).

Nor does Kletzing show the loss of any other tangible

benefits resulting from the action of the Civil Service Commission. Even had he remained on the registers from which he was removed, he would have had no reasonable chance of being certified for appointment. The few appointments that were made were of eligibles of substantially higher standing on the registers. Certainly this is not a problem of "sufficient immediacy or reality" to constitute a justiciable case or controversy.

Kletzing's brief seeks to direct the Court's attention away from these fundamental rules of law by trying to introduce in this appeal new evidence in the nature of new civil service examination announcements of which "the court will surely take judicial note." The court should note the more important fact that Kletzing does not allege that he has applied for any of these new examinations, or even that he desires to do so. Therefore, even if consideration is given to these new examinations, Kletzing has not established a case or controversy upon which this court may act.

Federal Trial Examiners Conference v. Ramspeck, 104 F. Supp. 734, aff. 202 F. 2d 312, reversed on other grounds, 345 U. S. 128, is cited by Kletzing to establish that here there is a case or controversy within the scope of judicial review. But in that case plaintiffs were occupants of positions for which the Commission was effecting a broad reorganization of appointment, promotion, tenure, and compensation for such positions. A holding in that case that a justiciable controversy existed does not compel this court to reach the same result where the action complained of has no such far-reaching effect. In connection with such cases as *United States v. Mitchell*, 89 F. 2d 805 (1937), cited by Kletzing as authority that judicial protection of rights of government employees is equally applicable to competitors for civil service positions, it might again be pointed out that Kletzing is not a competitor for any position under civil service.

We respectfully submit that, regardless of the expiration of the registers to which Kletzing seeks reinstatement, he

has not stated a cause or controversy upon which this court may act.

III

The Civil Service Commission's Determination That Blind Persons Cannot Efficiently Perform the Duties of the Positions for which Kletzing Was Examined Was the Exercise of Discretion Vested in the Commission by Law, and This Court Has No Jurisdiction To Coerce the Commission To Revise Its Judgment.

Russell Kletzing's right to a place on any Civil Service register, notwithstanding his blindness, is expressly limited by law to positions which "in the opinion of the Civil Service Commission may be efficiently performed" by a blind person. The Commission has carefully considered Kletzing's various appeals but has determined that he is not physically qualified to perform the duties of the jobs for which he applied. This was an exercise of administrative discretion delegated to the Commission by Congress and the Court may not substitute Kletzing's opinion or any other for the expert opinion of the Commission.

It is firmly established in administrative law that the courts will not substitute a contrary conclusion for a discretionary decision by an administrative body with statutory power to exercise its discretion.

* * * Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except on certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he exceeded his jurisdiction by reason of an error *either of fact or law* which induced his decision. [*Adams v. Nagle*, 303 U. S. 532, 542 (1938).]

As illustrative of the wide variety of administrative judgments which are not subject to judicial review, see *United*

States v. Carmack, 329 U. S. 230, 242-3 (1946); *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 543 (1950); *Ludecke v. Watkins*, 335 U. S. 160, 163-6 (1948); *Z. & F. Assets Realization Corp., v. Hull*, 311 U. S. 470, 489 (1941); *Switchman's Union of North America v. National Mediation Board*, 320 U. S. 297, 303 (1943); *Butte, Anaconda & Pacific Ry. Co. v. United States*, 290 U. S. 127, 136, 143 (1933); *Heiner v. Diamond Alkali Co.*, 288 U. S. 502, 507 (1933); *United States v. Chemical Foundation*, 272 U. S. 1, 15 (1926); *Dakota Central Telephone Company v. South Dakota*, 250 U. S. 163, 184 (1919); *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324-5 (1903); *Martin v. Mott*, 12 Wheat. 19, 31-32 (1827).

Mandamus or mandatory injunction may not be used to "direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either." *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206 (1930); *Louisiana v. McAdoo*, 234 U.S. 627, 633 (1914); *Litchfield v. The Register and Receiver*, 9 Wall. 575, 577 (1869); *Gaines v. Thompson*, 7 Wall. 347 (1868). To the same effect are *Edgerton v. Kingsland*, 83 App. D.C. 11, 168 F.(2d) 128, 130 (1947); *Thomas v. Vincent*, 80 App. D.C. 346, 153 F.(2d) 636, 638 (1946); *Brunswick v. Elliott*, 70 App. D.C. 45, 103 F.(2d) 746, 750-1 (1939).

The principle that courts may not control the exercise of discretionary judgment is equally applicable to actions for declaratory judgment. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-2 (1950); *Colegrove v. Green*, 328 U.S. 549, 551-2 (1946); *Miguel v. McCarl*, 291 U.S. 442, 452 (1934); *Doehler Metal Furniture Co. v. Warren*, 76 App. D.C. 60, 129 F.(2d) 43, 45 (1942).

The Courts will not interfere with administrative determinations regarding placement of Government employees. *Carter v. Forrestal*, 85 App. D.C. 53, 175 F. 2d 364 (1949); *Kutcher v. Gray*, 199 F. 2d 783 (1952). This is especially true where the plaintiff is seeking a declaratory judgment

of his rights to a Federal position. *Angilly v. United States*, 105 F. Supp. 259, aff. 199 F. 2d 642 (1952). The law in civil service cases is succinctly stated in *Powell v. Brannan*, 196 F. 2d 871 (1952):

"We think it well to reiterate that in civil service cases the task of the courts is a limited one. Certainly they cannot undertake to pass on a plaintiff's qualifications for any given post, or to compare them with those of an incumbent. It is not within their province to weigh the merits of a person's claim to a Federal job. Congress has established administrative machinery to make these determinations."

Congress has strongly indicated that the fixing of minimum physical standards for employees of the Executive Branch of the Government should not be subject to judicial review at all. This was a delegation to the Civil Service Commission of a duty to perform what is essentially a legislative power. The situation here is similar to that in *United States v. Bush & Co.*, 310 U.S. 371 (1940) wherein the court said, at page 380, that the exercise of such discretion

"is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review."

See also *Dorsheimer v. United States*, 7 Wall. 166 (1868), wherein the court refused to review the judgment of an administrative officer given by an Act of Congress similar to 5 U.S.C. 633(9) the power to act when in his opinion certain facts existed.

The decision made by the Commission was by its very nature an opinion judgment on a question in a field where there has been, and still is, considerable difference of opinion. Kletzing does not deny that the Commission exercised its judgment upon consideration of the duties of the

positions involved (J.A. 77A-84A); made a survey of employment of the blind throughout the Government (J.A. 21A-23A); and gave repeated and careful consideration to his case (J.A. 52A-77A, 84A-90A). Nor does he allege that the registers had expired in other than due course when they were no longer being used for the filling of vacancies.

The conclusion as to whether a blind person can efficiently perform the duties of the positions covered by the registers from which Kletzing was removed calls for an informed and expert judgment based on job analysis, organization of work in various departments and agencies, and efficiency studies. Such factors are obviously not those with which courts are accustomed to deal; rather they are appropriate for consideration and determination by experts in the field of employment practices. Courts are especially reluctant to infer an intention that judicial review be had of administrative judgments based on facts which "can only be known to an official or a body having wide experience in such matters and ready access to the means of information," and where conclusions reached "are not entirely susceptible of proof or disproof." *Williamsport Wire Rope Co. v. United States*, 277 U.S. 551, 561 (1928); or which must be based on "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may be beneath consciousness without losing their worth," *Chicago B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907).

Kletzing has completely failed to meet the contention of the Government that this court may not review the exercise of administrative discretion of an expert body vested with Congressional power to make the decision involved here. He marshals various arguments and reasons in support of his contention that he is qualified to perform the duties of the positions for which he was examined. This was a proper argument to make to the Civil Service Commission, not to the courts.

Kletzing cites a number of cases indirectly dealing with

this question. But all are distinguishable from the case at bar. *United States ex rel. Rodriguez v. Bowyer*, 25 App. D.C. 121 was expressly decided on the ground that the court was enforcing a ministerial obligation based on a statute which vested no discretion in the agency. Likewise *Deming v. United States ex rel. Ward*, 59 App. D.C. 188, 37 F.(2d) 818 (1930) involved an administrative determination as to the domicile of a particular person under a statute which, unlike the case here, did not make the "opinion" of the agency controlling. And *Matter of Loud v. Ordway*, 219 N.Y. 451, 114 N.E. 800 involved a designation of ineligibility by a state Civil Service Commission without a determination that the age of the applicant rendered him incompetent, whereas in this case the Commission has clearly made a determination that a blind person cannot efficiently perform the duties of the positions involved.

This court will not, we submit, review an exercise of administrative discretion by an expert body which has specifically been vested with such discretion by Congress.

IV

The Action of the Civil Service Commission in Removing Kletzing from the Registers Did Not Discriminate Against Him or Against the Blind in Contravention of 5 U.S.C. 633(9).

We have shown three fundamental reasons the courts should not make any determination of the merits of Kletzing's complaint. In the event that this court should reject all of these reasons, we contend that the action of the Civil Service Commission was in full compliance with the statute.

The basic principle of judicial review of administrative rulings is that the courts will not substitute their own judgment for that of the agency, but will decline to set aside the administrative ruling unless it is shown to be so arbitrary and capricious as to have no rational basis. *Dobson v. Commissioner*, 320 U.S. 489, 501 (1943). See also *United*

States v. Wunderlich, 342 U.S. 98 (1951); *United States v. Moorman*, 338 U.S. 457 (1950).

The facts in this case plainly do not form any basis for a conclusion that this was an arbitrary and capricious action. The record establishes that all of the positions fillable from the registers from which Kletzing was excluded require sight for the proper and efficient performance of the duties thereof, and the Commission has so determined (J.A. 77A-84A). There is no basis in the record for a contrary view. Kletzing's witnesses Rives and Dabelstein admit that blind persons could not perform the duties of these various positions without having someone else perform the visual functions involved therein (J.A. 33A-34A, 34A-7, A-8). Kletzing himself concedes this by his repeated suggestions to the Commission that if he was appointed to one of the positions, he would hire a reader at his own expense (J.A. 54A).

Kletzing has indicated that there are some non-civil service Government positions, including his job in the Bureau of Reclamation, which are held by blind persons. This makes obvious the fact that he has not shown a single civil service position in the professional assistant field which does not require the use of sight (see J.A. 14A). In fact, Kletzing's argument here is based on a fundamental misconception of the function of the Civil Service Commission and the position that it has taken in this case.

The pertinent function of the Commission is to establish registers of persons qualified to fill various competitive civil service positions in the executive branch of the Government. It creates neither the positions themselves nor the duties of such positions. The agency creates the job, and the Civil Service Commission helps the agency fill it by certifying to it applicants who, among other qualifications, are physically qualified to do the work. The agency, and not the Commission, is responsible for the establishment of various qualifications for the positions to be filled. If, as has happened here, the agencies have established positions requiring the use of sight, the Commission is derelict in its

duty if it certifies sightless persons for such positions. This, essentially, is what Kletzing asked the Commission to do. Failure to do that cannot constitute arbitrary and capricious action reversible by this Court.

Kletzing in his brief seeks to avoid this by arguing that the Commission's ruling barred him from a wide variety of professional assistant positions before the positions were created and their duties defined. This has been shown to be untrue; the Commission's ruling goes no further than removal of Kletzing from certain specified registers for certain specified positions.

Kletzing also presents two inconsistent hypothetical arguments. First, he argues that this decision bars him from future positions the duties of which could not be known to the Commission, and which might be performed by a blind person. This is erroneous. The Commission has not and would not in the future establish physical requirements and conduct competitive examinations for positions the duties of which have not been determined by the agencies in which such positions are established.

Contrarily, Kletzing argues that this action by the Commission has and will continue to prevent departments and agencies from establishing positions of this type not requiring the use of sight. This is simply not true. Any department or agency could now or in the future establish such a position, and the Commission would not only not object, but would immediately change its physical requirements for such a position, or permit the position to be filled by non-competitive examination (J.A. 93A).

The Civil Service Commission has taken the only position which it properly could take—that as long as departments and agencies include in the duties of particular positions functions which require the use of sight, the Commission must limit the registers for those positions to persons thus qualified to perform the required functions. Therefore we submit that the Civil Service Commission in removing Kletzing from the registers did not discriminate against

him or against blind persons in contravention of 5 U.S.C. 633(9).

CONCLUSION

For the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,

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